

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 91

THE UNITED STATES OF AMERICA, EX REL. NORWEGIAN  
NITROGEN PRODUCTS CO., PLAINTIFF IN ERROR.

THE UNITED STATES TARIFF COMMISSION, THOMAS O.  
MARVIN, WILLIAM S. GILBERTSON, ET AL,

IN ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA

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[redacted]



(31,105)

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1925  
**No. 405**

THE UNITED STATES OF AMERICA EX REL. NORWEGIAN  
NITROGEN PRODUCTS CO., INC., PLAINTIFF IN ERROR,  
*vs.*

THE UNITED STATES TARIFF COMMISSION, THOMAS O.  
MARVIN, WILLIAM S. CULBERTSON, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA

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# Court of Appeals of the District of Columbia.

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No. 4168.

UNITED STATES OF AMERICA EX REL. NORWEGIAN NITROGEN  
PRODUCTS CO., INC., Appellant,

vs.

THE U. S. TARIFF COMMISSION.

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a                   Supreme Court of the District of Columbia.

At Law.

No. 68310.

UNITED STATES OF AMERICA EX REL. NORWEGIAN NITROGEN  
PRODUCTS CO., INC., Relator,

vs.

THE UNITED STATES TARIFF COMMISSION AND THOMAS O. MARVIN,  
William S. Culbertson, David J. Lewis, Edward P. Costigan,  
William Burgess, and Henry H. Glassie, Constituting the United  
States Tariff Commission, Respondent-.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

b

Filed Dec. 12, 1923.

In the Supreme Court of the District of Columbia.

Law. No. 68310.

UNITED STATES OF AMERICA EX REL. NORWEGIAN NITROGEN  
PRODUCTS CO., INC., Relator,

vs.

THE UNITED STATES TARIFF COMMISSION AND THOMAS O. MARVIN,  
William S. Culbertson, David J. Lewis, Edward P. Costigan, Wil-  
liam Burgess, and Henry H. Glassie, Constituting the United  
States Tariff Commission, Respondent.PETITION FOR WRIT OF MANDAMUS AND STATEMENT OF APPLICABLE  
STATUTES, REGULATIONS, PROCEEDINGS, AND FACTS.Marion De Vries, Attorney for Relator.  
De Vries & Doherty, of Counsel.

c

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1 In the Supreme Court of the District of Columbia.

Law. No. 68310.

UNITED STATES OF AMERICA EX REL. NORWEGIAN NITROGEN PRODUCTS CO., INC., Relator,

vs.

THE UNITED STATES TARIFF COMMISSION AND THOMAS O. MARVIN,  
William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, Constituting the United States Tariff Commission, Respondents.

*Petition For Writ of Mandamus.*

To the Honorable Judges of the Supreme Court of the District of Columbia:

The relator, the Norwegian Nitrogen Products Company, is a corporation organized and existing under the laws of the State of New York, and is engaged in the business of importing sodium nitrite for sale within the United States.

That the defendants, Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and 2 Henry H. Glassie, constitute the United States Tariff Commission, and that all of said defendants personally reside within the District of Columbia. That the United States Tariff Commission is a public body created by the Congress of the United States by the provisions of Title 7 of the Revenue Act of 1916, the powers of which Commission are prescribed by said act and by the Tariff Act of 1922. That by said Acts of Congress the said Commission is charged with the duty of securing information for the use of the President and the Congress of the United States with respect to the production and cost of production in the United States of articles of merchandise which are being or may be imported therein from foreign countries, and also respecting the cost of the production of such articles in foreign countries, and the difference between the cost of the production of such articles in foreign countries and the cost of such production within the United States.

That the principal office of said Commission is in the District of Columbia.

That for the purpose of carrying into effect said act of Congress, said Commission has power to summon witnesses, take testimony, administer oaths, and require any person, firm, copartnership, corporation, or association, to produce books, or papers relating to any matter under investigation; and each member of the Commission has power to sign subpoenas; and each member of the Commission and the investigators, experts and agents of the Commission, when thereunto duly authorized by the Commission, may in a manner prescribed by law administer oaths and affirmations, examine witnesses,

take testimony and receive evidence, either orally or by deposition before any person duly designated and having power to administer oaths; and any person, firm, copartnership, corporation, or association may be compelled to appear and depose before such persons  
3 and to produce documentary evidence in the same manner as witnesses may be compelled to appear to testify and produce documentary evidence before the Commission.

That by the provisions of the Tariff Act of 1922, it is provided, that in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by said Act intended, whenever the President upon investigation of the difference in costs of production of articles wholly or in part the growth or product of the United States, and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed by said Act do not equalize the differences in costs of production in the United States and the principal competing countries, he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classification, or increases and decreases in any rate of duty provided in that Act, shown by said ascertained differences in such costs of production necessary to equalize the same; that thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the Islands of Guam and Tutuila) provided that the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act or in any amendatory act.

That in ascertaining the difference in costs of production under the provisions of said act it is therein provided, that the President, in so far as he finds it practicable, shall take into consideration the differences in conditions of production, including wages,  
4 costs of material, and other items in cost of production of such, or similar, articles in the United States and in competing foreign countries, the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States, advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country, and any other advantages, or disadvantages in competition.

That investigations to assist the President in ascertaining differences in costs of production under said Act, it is therein provided, shall be made by the United States Tariff Commission and no proclamation shall be issued until such investigations shall have been made.

That it is the duty of the said Commission, under the provisions of said Act, to hold public hearings respecting any matter under investigation and to give reasonable public notice of its hearings, and give reasonable opportunity to parties interested to be present, to

produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules and regulations as it may deem necessary for this purpose. The President is likewise authorized by said Act to make all needful rules and regulations for carrying out the provisions of the same.

That in pursuance of the authority vested in him by said Act, the President, on the 7th day of October, 1922, promulgated an order, or rule, as follows:

"Executive Order.

"It is ordered that all requests, applications, or petitions for action, or relief under the provisions of Sections 315, 316, and 317, of Title 3 of the Tariff Act approved September 21, 1922, shall be filed with, or referred to, the United States Tariff Commission for consideration and for such decision as shall be in accordance with law and the public interest under rules and regulations to be prescribed by such commission."

5 That on October 26th, 1922, the said Commission promulgated certain rules of procedure, among which provisions were the following:

"Parties who have entered appearance in investigations under Sections 315 and 316 shall be notified of the time and place of public hearings by registering and mailing a copy of the notice thereof addressed by each of such parties at the place of business thereof; and at such time and place such parties shall be afforded opportunity to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation \* \* \*.

"The Commissioner, or investigator, in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commissioner, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearance shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner, or investigator, in charge of the investigation, and also the record except such portions as relate to trade secrets and processes."

That on or about the 24th day of October, 1922, the American Nitrogen Products Company, a corporation organized and existing under the laws of the State of Washington, and having its principal office at Seattle, in said State, by its President and General Manager, C. S. Graff, filed with the United States Tariff Commission a petition and brief praying for an increase in the duty imposed by the Tariff Act of 1922 upon imported sodium nitrite from the rate of 3 cents per pound, as provided in said Act, to a rate of 4½ cents per pound, or an increase of the maximum of 50 per centum of the rate of duty imposed by said Act.

6 That thereafter, on the 27th day of March, 1923, said Commission, in response to said petition, made the following orders:

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title 3, of the Tariff Act of 1922, and under the powers granted by law, and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in cost of production of, and of all other facts and conditions enumerated in said Section, with respect to the articles described in paragraph 83 of Title I of said Tariff Act, namely: Sodium nitrite being wholly or in part the growth or product of the United States and of, and with respect to, like or similar articles wholly or in part the growth or product of competing countries.

"Ordered further: That all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place, or places, as the Commission may designate on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given."

That on the 20th day of July, 1923, said Commission made the following order:

"Notice is hereby given, pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10.00 o'clock a. m., on the 10th day of September, 1923, at which all parties interested will be given an opportunity to be present to produce evidence and to be heard with regard to the differences in cost of production, and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following articles described in paragraph 83, of Title I, of said Tariff Act, namely: Sodium 7 nitrite being wholly or in part the growth or product of the United States and of, and with respect to, like or similar articles wholly or in part the growth or product of competing foreign countries \* \* \*."

That thereafter, and prior to said tenth day of September, 1923, the relator, Norwegian Nitrogen Products Company, a corporation, of New York, importers of sodium nitrite, as aforesaid, by counsel, entered its appearance in said proceedings and then and thereafter duly made request of said Commission for a copy of the petition and brief of said American Nitrogen Products Company, praying for said investigation and setting out the grounds and reasons upon which said Commission ordered the said investigation to be made and the said proceedings to be had.

That said petition and brief of said American Nitrogen Products Company was at said time, and is now, in the custody of said defendants. That said petition is a public record and contains many undisclosed statements, as relator is informed and believes, that are not in the nature of trade secrets or processes as employed by said American Nitrogen Products Company in the making of sodium nitrite, or otherwise, but that said petition does, as relator is informed and believes, make certain representations to said Tariff Commission as to the cost of producing sodium nitrate by said American Nitrogen Products Company including capital charges upon the cost of its plant, investment costs of power, costs of labor and other items of cost, by reason of which it is claimed that said American Nitrogen Products Company cannot produce sodium nitrite unless said rate of duty be raised from three cents per pound, as provided by said Tariff Act of 1922, to the rate of  $4\frac{1}{2}$  cents per pound as prayed for by said company, and upon which allegations the said company prays that the  
Commission recommended to the President that the duty on  
8      sodium nitrite be increased 50 per cent over the rate now pro-  
vided by law.

That subsequent to the filing of said petition by the American Nitrogen Products Company, and the order entered thereon by the said Commission on the 27th day of March, 1923, providing for public hearings upon the same, said Commission employed certain investigators, experts and agents to visit the plant and offices of said American Nitrogen Products Company and other plants in the United States and in foreign countries producing and exporting to the United States sodium nitrite, which said investigators, experts and agents your relator is informed and believes received and accepted from the said American Nitrogen ex parte, secret and alleged confidential information, statements, records, and oral communications, respecting the cost of producing sodium nitrite by said American Nitrogen Products Company and by persons in the United States and in said foreign countries, all in support of the allegations as to the cost of production of sodium nitrite in the United States and such foreign countries, made in the petition filed with said Commission by the said American Nitrogen Products Company, which allegations, information, statements, records and oral communications had been withheld from the knowledge of the relator as aforesaid; and that, as relator is informed and believes, said Commission has before it, as the premise and predicate of any action or recommendation said Commission may make in the premises upon the subject of said petition of said American Nitrogen Products Company, may such ex parte, self-serving, secret, and undisclosed information, records, and oral communications obtained as aforesaid, by said investigators, experts and agents, to all of which the relator has been denied access, and by  
9      reason of which it has been impossible for relator to challenge  
or controvert either the allegations in said petition of said  
American Nitrogen Products Company or the aforesaid  
information, records, statements and oral communications ob-  
tained, ex parte and secretly as aforesaid, respecting the cost of

producing sodium nitrite in the United States and in said foreign countries; that the relator has accordingly been effectually denied the right to be present and to be heard upon the subject of said investigation and of said public hearing, or to examine the allegations and evidentiary matter submitted to said Commission with respect thereto, or to make any intelligent or sufficient representations to the Commission in the premises; or to determine whether or not said information, statements, records and oral communications, or any of them, were given under oath, by competent persons, or in any wise according as by law provided, or to determine whether or not said investigators were qualified persons free from bias or prejudice or other disqualifications; or whether or not said investigators, experts or agents were duly appointed or authorized or empowered by said Commission to perform the duties assigned or done by them or any of them in the premises.

That the purpose of the hearings ordered by said Commission upon the petition of the American Nitrogen Products Company was to ascertain, find, and determine as to whether or not the allegations made in the petition of said American Nitrogen Products Company upon which said hearings were ordered, were true in point of fact, and whether said allegations as to costs of production in the plant of said American Nitrogen Products Company and in the United States and in said foreign countries, supported the contention and the claim of the said company that sodium nitrite could not be produced in its plant or in the United States for sale in the United

States, and that the difference between the cost of production 10 of sodium nitrite in the United States and the principal competing foreign country could not be equalized unless the duty on the importation of sodium nitrite of three cents per pound, as presently provided by law, shall be increased fifty per centum, or to the rate of 4½ cents per pound; that the allegations in said petition of the American Nitrogen Products Company as to its costs of production or those in foreign countries or in the United States for said article, to wit, sodium nitrite, do not constitute trade secrets of processes in any sense, but do constitute the proper and only subjects of the hearings ordered by said Commission upon the petition of said American Nitrogen Products Company; that without a knowledge of said allegations in the petition of said American Nitrogen Products Company and of data and information received by the Commission as to the cost of producing sodium nitrite by it, and in the United States and in foreign countries, it has been and is, manifestly impossible for this relator to challenge any of said allegations or information or data by proof, or otherwise, and it is likewise impossible for this relator to present any arguments to said Commission upon the subjects of said investigation, or to enter into or to effectively participate in said hearings for the protection of its interests or the interests of the public in the premises.

That the relator has a vital and real interest in the subject of said hearings for the reason that it is engaged in the importation into and sale within the United States of said product, to wit, sodium nitrite,

and that said proposed increase in duty from three cents to four and one-half cents per pound, as desired by said American Nitrogen Products Company, and for which said American Nitrogen Products Company seeks to obtain the recommendation of the said Commission by its said petition, will, if recommended by said Commission and  
11 proclaimed by the President, constitute an impediment, injury and hindrance of the business of the said relator within the United States, and will reduce the possible profits of said relator upon the sale of said products, sodium nitrite, to the full amount of one and one-half cents per pound, and may possibly prevent and preclude the relator from continuing in the business of the sale of said product, sodium nitrite, within the United States. That by reason of the law, and of the regulations of the President of the United States, and of said Commission respecting the hearing ordered by said Commission upon the petition of said American Nitrogen Products Company, the relator had a right to examine and take a complete copy of the petition of said American Nitrogen Products Company filed with said Commission as aforesaid, and which was the subject of said hearings and investigation, and particularly of the allegations therein respecting the cost of producing sodium nitrite in the United States and said foreign countries by said American Nitrogen Products Company, or otherwise, and that an examination of said allegations and of any data or information obtained and a knowledge thereof was and is necessary for the protection of the rights of said realtor and to enable the said realtor to enter upon said hearings and to afford said Commission the benefit of evidence which might tend to disprove the allegations, claims and date of said American Nitrogen Products Company, and the data submitted by said investigators, and of the presentation of arguments against the credibility of said allegations and data submitted by said investigators, and of the presentation of arguments against the credibility of said allegations and data respecting cost of production, and all inferences and all conclusions which said American Nitrogen Products Company seeks to derive therefrom and to have approved  
12 and adopted as and for the conclusions of said Commission, and as the premises for the recommendations which said American Nitrogen Products Company prays that said Commission shall make to the President.

That on the 10th day of September, 1923, after said Commission had entered its order as aforesaid upon the petition of the said American Nitrogen Products Company for a hearing upon the subject of said petition, the relator, before said Commission at its office in the District of Columbia, made due request and demand upon said Commission for permission to examine the petition filed by said American Nitrogen Products Company upon which said hearings were ordered by said Commission; that thereupon the President of the said American Nitrogen Products Company, C. F. Graff, then and there present and sworn as a witness, interposed and objected to the Commission granting relator the right to examine said petition, or to obtain therefrom, or to be advised therefrom, as

to the allegations therein contained respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company, or elsewhere in the United States, claiming that said information was confidential and constituted a trade secret and that a knowledge thereof should be denied to the relator notwithstanding the fact that said alleged confidential allegations were the very ground and subject of the hearings and the investigation then being made by the Commission; that said allegations were in part, as relator is informed and believes, in the form of a printed document which had been published by the said American Nitrogen Products Company and distributed to its stockholders; that said witness refused to respond to questions propounded by counsel for relator as to the annual capacity of the plant of said American Nitrogen Products Company except to say:

13      "We consider the exact capacity of the plant as a trade secret; also our actual costs of production, because of the fact that they, in turn, depend upon the processes and numerous things which, certainly, are confidential information and should not be furnished to our competitors."

The counsel for relator further asked said witness, President of said American Nitrogen Products Company, as to the unit cost of labor employed in the plant of said company, to which said witness answered:

"That is all information which we certainly do not consider we should give to our competitors—the cost of our labor, or the cost of our power, or the cost of our raw material and all that."

And to the further questions propounded by counsel for relator to said Witness, President of the American Nitrogen Products Company, as aforesaid:

"How much do you estimate as the cost of your power?"

The said witness answered only:

"We do not care to disclose our power rate to our competitors."

And that notwithstanding the fact that these questions propounded by counsel for relator were immediately and directly pertinent to the subject of the hearing and in no wise trade secrets or processes, the said Commission sustained said witness, C. F. Graff, President of said American Nitrogen Products Company, for whose benefit and upon whose petitions said hearings were ordered, in his refusal to respond to said questions, and said Commissioners, the defendants herein, further refused and declined to permit said relator to examine the petition and data of said Nitrogen Products Company or the 14 data collected by said investigators on file with said Commissioners, and then in their custody, and refused to permit said relator to ascertain from said petition, the allegations therein contained

respecting the cost of producing sodium nitrite by said American Nitrogen Products Company, or otherwise in the United States or in said foreign countries; that said allegations in said petition so refused to the examination of relator in no wise constituted trade secrets or processes; and that said American Nitrogen Products Company, in filing said petition and praying for an investigation of the matters therein contained, and in praying for consequent public hearings upon the same, thereby made such petition and the matters and things therein contained public records, and thereupon waived any right to have said petition and the contents thereof, not including trade secrets and processes, withheld from the knowledge of the relator and of any other person, firm or corporation, having an interest in the subject of and appearing in said hearings and investigation; that said American Nitrogen Products Company filed said petition voluntarily and upon its own motion, and that neither said petition nor any allegation respecting costs of production, or respecting any other matter or thing therein contained, was legally obtained by said Commission upon any pledge of secrecy or of confidence, and the said Commission had no right under the law to withhold said petition or any data or file relating to the subject of said hearing, excepting matters pertaining to trade secrets and processes therein contained if those, from the examination and knowledge of relator; and that, by refusing to permit said relator to examine said petition and data, not including matters therein contained respecting trade secrets and processes, said Commission has denied the relator valuable rights without the exercise of which relator will be  
15 irreparably damaged contrary to the meaning and intent of the acts of Congress governing said Commission and the hearings and investigations authorized to be conducted by it and the interest of the public in the premises.

That upon the 11th day of September, 1923, relator, by counsel, submitted to said Commission the following requests:

First. That relator, as an interested party in said hearing, have reasonable opportunity to inspect and to be heard upon all evidentiary matter received or to be received by said Commission not deemed to constitute trade secrets or processes.

Second. That the Commission afford the relator an opportunity to offer evidence in contravention of any evidentiary matter in the hands of the Commission, and to be fully heard upon all such evidentiary matter respecting the cost of producing sodium nitrite in the United States and in foreign countries.

Third. That the relator be permitted to examine and controvert any evidentiary matter submitted to the Commission respecting the number of laborers employed and the wages paid by said American Nitrogen Products Company.

Fourth. That the relator be permitted to examine and controvert any evidentiary matter submitted to the Commission respecting the capital stock and investment of the American Nitrogen Products Company and the cost of its plant.

Fifth. That the relator be given the right and opportunity, at a public hearing, to cross examine the experts of the Commission who

received from said American Nitrogen Products Company from persons in the United States and foreign countries, and to offer testimony in contravention thereof, and to be heard in argument thereon.

16 That, thereafter, on the 6th day of October, 1923, the said Commission made the following orders:

1st. "In so far as the first request of Judge DeVries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied."

2nd. "In so far as the second request of Judge DeVries \* \* \* is a request to inspect the original cost and other data collected in the field by the Commission's investigators on the figures showing the details of individual cost of production obtained by the Commission under sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied."

3rd. "In so far as that request (the 33rd request) asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company, submitted by or obtained from said company under the sanction of section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied."

4th. "In so far as that request (the 4th request) asks for inspection of the original data relating to the production costs of the American Nitrogen Products Company, submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied."

5th. "The 5th request of Judge DeVries, in so far as it asks for an opportunity to cross examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigations in the field, is denied. \* \* \* In so far as it

17 concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

That by reason of the acts of said Commission, the said petition of said American Nitrogen Products Company and the allegations therein contained and data submitted to the Commissioner, respecting the cost of producing sodium nitrite in the United States and in foreign competing countries remain secret and undisclosed, and no real hearings have been held thereupon; and said Commission is proceeding and attempting to and will act upon said petition and forward to the President recommendations thereupon without having held due and legal public hearings upon the same, contrary to the rules of said Commission, the order and rules of the President in the premises and the law, and after having denied and while still deny-

ing the relator the right to be advised of the contents of said petition and of the allegations, data and information gathered by said Commission upon which said American Nitrogen Products Company prayed for an increase in the duty on the importation of sodium nitrite from three cents to four and one-half cents per pound, as aforesaid.

That in and by said sub (c) of Section 315 of the Tariff Act of 1922, is provided the sole and only provision of law providing opportunity in the said proceedings authorizing the President to ascertain the facts constituting the difference between the costs of production of merchandise in the United States and in foreign competing countries, prescribed by Congress in said act as the measure of imposts or import duties in and by said act levied by Congress, wherein and whereby interested parties may legally be present, offer evidence or be heard in relation thereto and contest the amount of said duty according as their interest may demand.

18 That the investiture in the President by Congress, in said Section 315 provided, of said power to ascertain said facts, and determine and proclaim said differences in costs of production as therein provided is a due and legal delegation of the powers therein delegated and does not contravene or extend beyond the powers of Congress, to lay and collect imposts and duties, to regulate commerce with foreign nations, and, to make all laws by Congress deemed necessary and proper for carrying into effect said power to lay imposts and duties and to regulate commerce, as provided by Section 8 of the Constitution of the United States.

That by reason of the foregoing there is no plain, speedy and adequate, if any remedy whatsoever, for this relator for the denial by said Commission to this relator of the rights as hereinbefore stated, to be present, to offer evidence and to be heard as hereinbefore alleged in said proceedings.

And your relator further alleges that any discretion allowed this Honorable Court in this proceeding should be exercised in favor of this relator in remedy of said alleged rights and of a speedy determination thereof and of the constitutionality of said Section 315 of said Tariff Act of 1922 for the following reasons:

That immediately following the enactment of said Section 315 and Section 318 of said act, the organization of said Tariff Commission, and the promulgation of said executive order or rule, said Commission received and is now constantly receiving numerous petitions for changes thereunder of rates of duties and the classifications pro-

19 vided in Section 1 of said act; that said Commission, as by law required, is diligently pursuing numerous investigations in the United States and in foreign countries in pursuance of said act and said petitions, whereby large sums of the public monies appropriated therefor are being expended, business of the country is correspondingly being adjusted or held in abeyance, and members of the Congress are relying thereupon to satisfy demands for changes in import tariff rates demanded and deemed for the public welfare—all of which will be without avail, if said Section 315 shall judicially be declared without and beyond the constitutional powers of Con-

gress; that speedy judicial determination of the said issues will more greatly conserve the public welfare than can possibly be afforded in any matter presently pending in the courts of the United States.

Wherefore your relator respectfully prays that a rule or order, issue out of this Honorable Court directed to Mr. Thomas O. Marvin, Mr. William S. Culbertson, Mr. David J. Lewis, Mr. Edward P. Costigan, Mr. William Burgess and Mr. Henry H. Glassie, constituting the United States Tariff Commission, and the said United States Tariff Commission, respondents herein, requiring said respondents on a day certain, to be named therein, to appear and show cause, if any they have, but not under oath, (oath being expressly waived) why the writ of mandamus should not issue out of this Honorable Court to them requiring that they permit the relator, Norwegian Nitrogen Products Company, of New York, to examine the petition of the American Nitrogen Products Company and all data, information and evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries, and to show cause, if they have,

why a public hearing should not be granted, at which the said  
20 relator and any other person, firm or corporation having an

interest in the subject-matter, appearing herein shall have the right and opportunity to cross examine investigators, experts, agents and witnesses who may have supplied any such data, information or evidentiary matter, to offer evidence in contravention of any of such data, information and evidentiary matter, to be heard thereupon and to present arguments and representations against said petition, the allegations therein contained, and any conclusions which may be made therefrom, and against the probative and legal value of any and all data, information and evidentiary matter relating to the subject of said hearings on file with the Commission, upon which the said American Nitrogen Products Company prays that said Commissioners, respondents herein, recommend to the President that the duty of three (3) cents per pound on the importation of sodium nitrite, as presently fixed by law, be increased to four and one-half (4½) cents per pound, under the provisions of the Tariff Act of 1922.

MARION DE VRIES,  
*Attorney for Relator.*

Dated, December 8, 1923.

DE VRIES & DOHERTY,

*Of Counsel.*

21 CITY OF NEW YORK,

*Borough of Manhattan,*

*County of New York,*

*State of New York, ss:*

T. Lodrup, being first duly sworn, deposes and says:

That he is the President of the Norwegian Nitrogen Products Co., Inc., the Complainant in the above and foregoing Bill of Com-

plaint; that he has read the same and knows the contents thereof, and that the same is true in substance and fact except as to such matters as are therein alleged as to information and belief and as to those matters and allegations he believes the same to be true.

T. LODRUP.

Subscribed and sworn to before me, Nancy E. Williams, a Notary Public in and for the Borough of Manhattan, City of New York, County and State of New York, this 8th day of December, A. D. 1923.

[SEAL]

NANCY E. WILLIAMS,  
*Notary Public.*

My Commission will expire March 30, 1924.

Notary Public, New York County,  
New York County Clerk's No. 266,  
New York County Register No. 4214,  
Term expires March 30, 1924.

22 In the Supreme Court, District of Columbia.

Law. No. —.

UNITED STATES OF AMERICA ex Rel. NORWEGIAN NITROGEN PRODUCTS  
Co., Inc., a Corporation, Relator,

vs.

THE UNITED STATES TARIFF COMMISSION and THOMAS O. MARVIN,  
William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, Constituting the United States Tariff Commission, Respondents.

*Statement of Applicable Statutes, Regulations, Proceedings, and Facts.*

The "Tariff Act of 1922," approved September 21, 1922, after levying duties upon specified imports, providing free or conditional entry for others and various administrative provisions affecting the same, as a further part of said Act, provides:

23 "Section 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classification or increases or decreases in any rate of duty provided

in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations, such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philipine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

\* \* \* \* \*

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

24 Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigations shall have been made. The Commission shall give *reasonable public notice of its hearings* and shall give *reasonable opportunity to parties interested to be present, to produce evidence, and to be heard*. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

\* \* \* \* \*

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section."

On October 7, 1922, the President duly promulgated an order or rule, as follows:

"Executive Order.

25 It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation *as shall be in accordance with law* and the public interest, under rules and regulations to be prescribed by such Commission. (Italics ours.)

WARREN G. HARDING.

The White House, October 7, 1922."

On October 26, 1922, the United States Tariff Commission duly promulgated certain rules of procedure providing among other things, the following:

"Parties who have entered appearance in investigations under Sections 315 and 316 shall be notified of the time and place of public hearings by registering and mailing a copy of the notice thereof addressed to each of such parties at the place of business thereof, and at such time and place such parties shall be afforded opportunity to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

\* \* \* \* \*

"The commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes." (Italics ours.)

That by Section 318 (a) and (c) of the said Tariff Act of 1922, it is provided:

26 "Sec. 318. (a) That in order that the President and the Congress may secure information and assistance, it shall be the duty of the United States Tariff Commission, in addition to the duties now imposed upon it by law, to—

\* \* \* \* \*

(c) In carrying out the provisions of this section the commission shall possess all the powers and privileges conferred upon it by the provisions of Title VII of the Revenue Act of 1916, \* \* \*"

That Sec. 701 of Title VII of the Revenue Act of 1916, among other matters, enacts:

"The principal office of the Commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such agents as it may designate, prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country."

That Section 706 of Title VII of the Revenue Act of 1916, in part, provides:

Sec. 706. That for the purpose of carrying this title into effect the commission or its duly authorized agent or agents shall have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, co-partnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, co-partnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation. Any member of the commission may sign subpoenas, and members and agents of the  
27 commission, when authorized by the commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

\* \* \* \* \*

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person, firm, co-partnership, corporation, or association, may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission, as hereinbefore provided."

That Section 708 of Title VII of the Revenue Act of 1916 provides:

"Sec. 708. It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known *in any manner whatever not provided for by law*, to any person, *the trade secrets or processes* of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any

offense against the provisions of this section shall be made a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment,\* \* \* " (Italics ours.)

28 On or about October 24, 1922, the American Nitrogen Products Company, of Seattle, by its President and General Manager, C. F. Graff, filed with the United States Tariff Commission a petition, in the form of a brief, for an increase of the duty upon sodium nitrite from 3 cents per pound, as provided by paragraph 83 of the said Tariff Act of 1922, to 4½ cents per pound. Thereafter, on the 27th day of March, 1923, the United States Tariff Commission adopted the following order:

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in Paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing countries.

"Ordered further, that all parties interested shall be given an opportunity *to be present, to produce evidence, and to be heard* at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given.

\* \* \* " (Italics ours.)

On the 20th day of July, 1923, the Commission adopted the following order:

29 "Notice is hereby given pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10.00 o'clock A. M. on the 10th, day of September, 1923, at which *all parties interested will be given an opportunity to be present, to produce evidence, and to be heard* with regard to the differences in cost of production and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following article described in paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries. \* \* \*"

Thereafter, prior to said 10th day of September, the Norwegian Nitrogen Products Company, of New York, importers of nitrite,

by counsel, appeared in said proceedings and duly made request of said Commission for a copy of the aforesaid petition therein filed.

In partial compliance therewith there was officially transmitted counsel for said Norwegian Nitrogen Products Company said petition or brief, deleted, and as so deleted reading as follows:

"Seattle, Wash., October 24, 1922.

United States Tariff Commission,  
Washington, D. C.

GENTLEMEN:

Sodium Nitrite

1. Due to foreign competition, mainly German, Swiss and Norwegian, this Company's air nitrate plant located at La Grande, Washington, was closed April 1, 1921, and has remained closed ever since. This plant manufactures exclusively sodium nitrite and its very life is therefore dependent on this product and it alone. Any change in plant or processes would be prohibitively expensive. It must remain a sodium nitrite plant. This plant is the largest producer of 30 sodium nitrite in this country. It is the only plant of its kind on the American continent, employing what is known as the electric arc method of air nitrogen fixation. Because of this fact its existence and maintenance is of vast interest and importance to the United States Government which has time and again gone on record as favoring the investigation, development and fostering of the various nitrogen fixation methods in this country. As a case in point we mention the expenditure at Muscle Shoals of \$105,000,000 by Congress in the building of air nitrate plants. Our plant was built in 1917 and involves an expenditure of \$250,000, all of which is private capital. Only a depletion of the huge stocks of foreign nitrite imported into this country prior to the embargo taking effect and a reasonable future sales price, can maintain this plant. The stocks are gradually being depleted but the destructive competition of the large foreign air nitrate works still exists in spite of the three (3) cent duty as proven in the next paragraph. These large foreign air nitrate works manufacture sodium nitrite as a by-product and can therefore dispose of it very cheaply. They are, of course, also enormously benefited by the disparity in foreign exchange. A reasonable sales price is between nine (9) and (10) cents per pound f. o. b. consumers' works.

\* \* \* (Confidential portions omitted.) \* \* \* In the hope of better business to come, we are endeavoring to resume operations. However, we were informed later that the importers offered to go as low as seven and one-half ( $7\frac{1}{2}$ ) cents per pound, all charges and duty paid, in order to secure the business. It is reasonable to suppose that even this price will be lowered in the future if such action becomes necessary to secure the trade. But even on the seven and one-half ( $7\frac{1}{2}$ ) cents per pound delivered price basis the addition of an extra fifty (50) per cent of duty or one and one-half cents per pound will fix the price of foreign nitrite in this country 31 at nine (9) cents per pound. If we are forced below this

figure permanently it will not allow us a reasonable margin of profit as clearly proven in next paragraph. \* \* \* (Confidential portions omitted.) \* \* \*

3. Our costs are shown below. We invite particular attention to the fact that our far western location does not adversely affect our delivered costs because of special low commodity freight rates granted us as an encouragement to the industry. Any raw materials used are also obtained very cheaply. Overhead, salaries, and other charges are also kept at a minimum. For instance, the highest salary paid any official is only \$500 per month. This is the president and general manager of the company. It is merely nominal and proves our economies in endeavoring to establish the business. We, therefore, consider our costs fair, reasonable and competitive, in so far as domestic manufacture is concerned. It is the best that can be done with a relatively small plant and until the industry is developed and established on a larger scale. This we are endeavoring to do and when such expansion has taken place and costs have been reduced, this company shall be only too glad to give the consumers the benefit of same and the President may then reduce the duty. In meantime, however, we need the added protection very badly indeed.

\* \* \* (Cidfidential portions omitted) \* \* \*

4. The profit assumed above 1.2c. per pound equals \$24.00 per ton which, on 100 tons monthly production, is \$2,400 or \$28,800 per year. Our outstanding capital stock, fully paid up, is \$1,229,-500. The above profit is, therefore, merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion and fair profits to come in the future that this corporation is heroically continuing its efforts to put the business on its feet in this country. In the meantime, however, we must at least exist. It is certain that a total duty of at least four and one-half (4½) cents 32 per pound is necessary to insure this. Only two dividends on the capital stock of this company have been paid and then only on the preferred stock. This was during the war years, 1917 and 1918. The net earnings since then have been insufficient to take care of dividends.

5. We call your attention to the fact that market quotations as given on imported sodium nitrite as printed in the chemical journals always considerably exceed the *inside* prices quoted on bona fide contract competitive basis. It is only through a competitive base such as cited in paragraph 2 of this letter than the *real* price is disclosed. Such inside price quotations are seldom transmitted in writing. They are generally handled verbally.

6. Attached hereto please find photograph of the plant.

7. In view of all the above we respectfully request an early report and recommendation to the President that the duty on sodium nitrite be increased fifty (50) per cent.

Very truly yours,

AMERICAN NITROGEN PRODUCTS  
COMPANY,

(Signed) By C. F. GRAFF, Pres.,  
*President and General Manager."*

Thereafter, and on the 10th day of September, 1923, and as in said notices stated, the Commission duly assembled and the following proceedings were, among others, had:

"The Chairman: Witnesses desiring to offer testimony will now be heard. Witnesses will give their names and addresses and whom they represent.

"Mr. De Vries: Mr. Chairman, I would like to say that I appear on behalf of the Norwegian Nitrogen Products Company of New York in opposition to this petition.

33 "Preliminarily, I would like to make formal request that we be supplied with a full and complete copy of the petition herein, instead of the petition with part of the facts eliminated therefrom. I make that formal request as a matter of record, and shall present some matters to the Commission on it at a later time."

*"Testimony on Behalf of Applicant.*

**C. F. Graff,** was called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

"The Witness: First, with respect to the request of counsel for the opposition, to the effect that they be furnished with complete copies of our petition, and the data furnished, we object to this for the reason that we have been promised by the Commission that *confidential information would be so treated.* A large part of the information furnished in those briefs and data is confidential, and was so marked at the time. We are perfectly willing to give any and all data to the Commission, and have done so, but we expect to be protected under the ruling as made to that effect.

"The Chairman: The Commission will protect the *confidential nature of all information submitted to it.*"

"The Witness: As soon as the permanent tariff went into effect, September 21, 1922, large quantities again began to arrive. \* \* \* Then is when we appealed for relief to the United States Tariff Commission, submitting our first brief on October 24, 1922. We followed this by another brief or two later, on January 22nd, I think, and February 9."

"The Witness: We have, Mr. Chairman, furnished very complete data in detail as to our particular capacity but, as stated before, we have been promised that this matter would be treated confidentially, and I would like to have it remain that way, if you please."

"By Commissioner Culbertson: I do not have any idea how large your American plant is, what the physical assets are, and it 34 is a very vital question, it seems to me, in view of the fact that you are the only, or the major producer of this product and the only producer of this product by the arc process. You ask that the duty be increased. The public is entitled to know how much

physical assets there are asking for this protection. Do you see my point?

"The Witness: Yes, sir.

By Commissioner Glassie:

Q. If this information Mr. Culbertson is asking about, which you do not seem inclined to give here, is in the record as a part of the work done by our investigators— A. (Interposing.) Yes, sir.

Q. (Continuing:) Would you have the same objection to our making it public as a part of the facts in the case? A. Mr. Glassie, that is the very point; we were assured it would not be disclosed publicly.

Q. You regard, then, the statement of your capital assets as confidential, as well as the costs of production? A. Yes, sir; so far as the general public or our competitors are concerned, we would feel that way about it."

"By Commissioner Culbertson:

Q. Could you give me the proportion of that capitalization which is represented by physical assets, and the proportion which is represented by patents and good will? A. That is all shown in detail in the record. We have given that very information, and it was verified by the Commission's experts in our offices.

By Commissioner Glassie:

Q. It is available already to the Commission? A. Yes, sir.

Q. But it is not available to the other parties interested in this hearing? A. We do not feel, in view of our circumstances and the conditions, that that should be submitted to our competitors."

By Commissioner Culbertson:

35 Q. I have here the balance sheet of your company for 1920, which purports to give the capital assets and the current assets and the deferred charges; also the capital stock, current liabilities, deferred liabilities, and the surplus. The total capital stock outstanding is \$1,229,500. The common stock authorized and issued consists of 8750,000; preferred stock, 7 per cent cumulative, authorized, \$9,250,000, less unissued, \$8,770,500—

Commissioner Glassie (interposing): May I ask if that is in the record?

Commissioner Culbertson: It is called "balance sheet and income expense statement, 1920, of the American Nitrogen Products Company."

The Witness: Excuse me, Mr. Chairman. We were assured that this matter would be treated confidentially.

By Commissioner Culbertson:

Q. This is not confidential. This is a public document. A. No, sir; absolutely not. It is for our own stockholders.

Q. I assumed that when a thing was published, it was distributed. A. That was simply our financial statement sent out to our stockholders, but the information is all there, and I will be glad to answer any and all questions *the Commission* may have with regard to the whole matter. There is nothing that we wish to hide in any manner, shape or form.

Q. I do not think that an ordinary balance sheet would be considered as confidential matter under the statute, so that I do not feel that there has been any violation. A. It discloses our profits, our losses, our operations, and the entire history.

Q. Nothing that I have said discloses that. A. Do not misunderstand me, please. I am perfectly willing to go into all these questions with *the Commission*, but, standing here as I do in front 36 of our competitors, who are able to take advantage of anything and everything, we do not feel——

By Commissioner Glassie:

Q. (Interposing.) Am I clear in understanding that everything you have been asked about is in the record? A. Yes, sir.

Q. And was obtained by the investigators sent out by the Commission? A. Yes, sir.

Q. And that your sole point is, not that the Commission shall not have it, but that your competitors shall not have it? A. Absolutely."

By Commissioner Culbertson:

Q. What is your output per horsepower year? That is the basis on which you figure your output, is it not? A. No, sir. It is figured per kilowatt year, more properly.

Q. Per kilowatt year? A. Yes, sir. That production is approximately the same as the Norwegian. It is about the same yield.

Q. You have the same yield as the Norwegian? A. Yes, sir.

Q. Is that fact confidential in the record—your yield? A. Well, certainly I would say so, except in a general way."

\* \* \* \* \*

On cross examination as to the stock issued by the American Nitrogen Products Company and any existing contracts affecting its earnings and the cost of its plant, the following occurred:

"The Chairman: Proceed with your questions.

The Witness: Mr. Chairman, that information is all in detail in the data submitted, showing our costs of investment, showing 37 the actual cost of the plant. Nothing is included on common stock, or any of those things. It is all given in the data.

Mr. De Vries: We do not know anything about that."

Further cross-examination developed as follows:

"By Mr. De Vries:

Q. Your extreme capacity is around 1,200 tons a year?

The Witness (addressing the Chairman): Mr. Chairman, that is information which we have considered confidential, that is, our exact capacity, which is given in the data submitted.

By Mr. De Vries:

Q. We did not get it from the data you submitted, Mr. Graff, you can rest assured of that. A. We considered the exact capacity of the plant as a trade secret; also our actual costs of production because of the fact that they, in turn, depend upon the processes and numerous things which certainly are confidential information and should not be furnished to our competitors.

By Commissioner Glassie:

Q. You have not furnished that to the Commission, however? A. Yes, sir; we have furnished them to the Commission. We have given all of that to the Commission.

Commissioner Glassie: Again I submit, Mr. Chairman, that the question as to whether this information is to be given out must be decided. The issue has got to be met, and it might as well be met definitely in this case as in any other.

The Chairman: The Commission has considered that when anyone submits information to it which is declared to be confidential, it shall observe the confidential relation.

By Mr. De Vries:

Q. Have you the unit cost of the labor employed in that factory?

A. We have all that, but that is all information which we  
38 certainly do not consider we should give to our competitors,  
the cost of our labor, or the cost of our power, or the cost of  
our raw material, and all that. That is competitive information,  
and it is in the hands of the Commission.

By Mr. De Vries:

Q. How much do you estimate as the cost of your power? A. We do not care to disclose our power rate to our competitor.

By the Chairman:

Q. But you have submitted that to the Commission? A. Yes."

Thereupon the Commission adjourned to September 25, 1923, at 10 o'clock A. M.

On September 11, 1923, counsel for the Norwegian Nitrogen Products Company addressed the Commission, as follows:

"September 11, 1923.

To the Honorable United States Tariff Commission,  
Washington, D. C.

GENTLEMEN:

In support of the motion made by the undersigned at the hearing of the application of the American Nitrite Products Company for an increase of duty upon Sodium Nitrite before your Commission, September 10, 1923, that I be supplied with a complete copy of the petition submitted in behalf of the petitioner herein, in order that we might be "heard" thereupon, I beg to renew that request and that we be supplied all facts submitted to the Commission herein and to submit the following:

The law controlling the proceedings of the Tariff Commission in this particular is a part of Paragraph (e) Section 315 of the Tariff Act of 1922, reading:

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the 39 United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

Section 318, Subdivision (e) reading:

"The United States Tariff Commission is authorized to adopt an official seal, which shall be judicially noticed."

and Subdivision (f) of Section 318, which reads:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It is obvious therefrom that the investigations by the Tariff Commission are judicial in nature; that the result of these investigations is "evidence", and that "parties interested" are entitled "to be present", "to be heard", as well as "to produce evidence".

Every statute should be read in the light of the public facts which lead to its enactment. Tariff investigations for the purpose 40 of fixing duties previously had been conducted by the Finance Committee of the Senate and the Ways and Means Committee of the House. Witnesses appearing before those bodies were not sworn. The evidence collected by these committees, upon which duties were fixed, was unverified and in the form of letters received by mail, statements submitted by unsworn witnesses appearing before the committees, statements made to members of the committees and members of Congress, and by members of Congress, without sanctity of oath and without opportunity of interested parties in opposition thereto being heard. The experiences of all time have demonstrated that investigations of this character did not and could not elucidate the truth. The result was that rates of duty were fixed upon insufficient, incomplete and false statements. All men know that statements made by interested parties in matters wherein their financial interests are at stake can not be relied upon save when made under the sanctity of oath, with opportunity of cross-examination and elucidation. It was in this view that Section 315 was enacted. It was in this view particularly that the first above quoted paragraph was inserted as a part thereof. This paragraph, as it integrally shows, was calculated to require that the evidence upon which the Tariff Commission acted should be verified and taken after due notice to all interested parties who were entitled to be present, to produce evidence, and to be heard upon all the evidence produced and not upon a part of such evidence.

Owing to the broad scope of these investigations by the Tariff Commission they were empowered by the law to "adopt such reasonable procedure, rules, and regulations as it may deem necessary." The broad interpretation of that sentence which is justified would empower the Tariff Commission to do all things necessary which would effect the results secured interested parties by the preceding provision.

41 The wisdom of this requirement was well demonstrated in the hearing of September the 10th. The parties appearing in opposition had been supplied but a part, and a very minor part, of the petition and none of the evidence which had been submitted to the United States Tariff Commission in the pending case. The only relevant statement which was submitted to them upon the cost of production in the United States as a basis for their investigations and opposition was the statement in the petitioner's petition that "Our outstanding capital stock, fully paid up, is \$1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion, *and therefore profits to come in the future*, that this corporation is heroically continuing its efforts to put the business upon its feet in this country." Wherefore, of course, the opposition worked back from this statement to

prove its falsity. The opposition was laboring entirely in the dark as to further and more complete statements made by the petitioner to the United States Tariff Commission. As a matter of fact, a representative of the Commission had gone to Seattle and procured an entirely different statement from the petitioner and a representative of the Commission had gone abroad and secured statements as to cost of production of nitrite abroad. The opposition knew nothing of these statements. It was not furnished with any of the data thus produced before and upon the files of the Commission. They appeared totally in the dark as to the real case or actual facts which had been presented to the Commission by the petitioner. Wherefore, the presentation of the case of the opposition in the light of what it had been officially informed by the Commission was the case made by the petitioner and which it would have to meet, whereas in truth and fact the files of the Commission presented an entirely different case.

Now it is respectfully submitted that no such proceeding was contemplated by Congress, when it provided in the law that in the 42 proceedings of the Tariff Commission interested parties could be present and heard. To be heard upon what? Upon a different case than that which had been presented by the petitioner? Upon but a fragmentary part of that which had been presented by the petitioner and gathered by the Tariff Commission? What do the words in the statute "to be heard" mean? Do they mean that interested parties are to appear before the Tariff Commission and when they seek to be heard upon the case as submitted are told that that which they have appeared there to be heard upon has been submitted to the Tariff Commission without the sanctity of oath, without their being present, without being verified, and without any privilege of interested parties to be present when submitted or to examine the same? It is respectfully submitted that no such proceeding by the Tariff Commission can ever be justly sustained under the law controlling their investigations. Is testimony taken by a representative of the Commission in the private office of the petitioner in Seattle, without the sanctity of oath, without interested parties being present, such an investigation as is contemplated by the law which provides that such investigations must be upon due notice to interested parties at a time and place when they can be present and heard? Is it true that this requirement of the law permits of investigations abroad of cost of materials and costs of labor and costs of power which are not given under oath, which are given out of the presence of interested parties, which are given without an opportunity to be heard, to be used by the Commission without any opportunity at any time for the opposition to be present or to know of the same and to be heard thereupon?

Now, it is not here contended that the Tariff Commission must be curtailed in its investigations and hearings to such before the Board in open session, but it is insisted that every particle of evidence gathered by the Commission or its representatives should not 43 be accepted by that Commission for its final action until the interested parties shall have an opportunity to be present at its

offering or to examine the same and be heard thereupon and to offer evidence in contradiction thereof before judgment of the Commission is rendered thereupon.

That is the very thing which caused public sentiment in this country, and for which there is an overwhelming sentiment in this country, to transfer the making of our tariff rates from Congress into a judicial commission. One of the principal reasons moving this change of the law was that testimony given and accepted in the making of our tariff rates should be verified testimony submitted in the presence of all interested parties who should have a right to be heard thereupon, and give evidence in contradiction thereof.

So, it is respectfully submitted that until this opportunity as to all evidence submitted, which is not "trade secrets", is afforded interested parties no valid findings by the Commission can be had.

As to what is a "trade secret", it is particularly appropriate to refer to the case in re Bolster, 110 Pacific Reporter, 547. The case arose in Seattle and was decided by the Supreme Court of the State of Washington. The syllabus truly interprets the decision. It states:

"The term "trade secret" as usually understood means a secret formula or process, not patented, known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.

"The president of a corporation when required to appear and testify as a witness may not refuse to produce the record books of the corporation in response to a subpoena duces tecum because an examination of the books would infringe a right of privacy."

Now, it must be perfectly plain to all that costs of constructing  
44 a plant, that costs for the purchase of water power, that costs paid for a patent right, are not such trade secrets as are contemplated by the law and which are the only things in which a witness is protected as confidential in his business in a judicial investigation. If these things were confidential there never could be any investigation by this commission or by a court into "Cost of production." If this be true, inordinate profits could not be inquired into and profiteering would be protected by the law. It is respectfully submitted that any American producer or manufacturer who makes claim that Congress has erred in fixing a rate of duty as too low or when any importer claims that a rate of duty fixed is too high, they must come into court with clean hands, so to speak, with an open record, open not only to the commission but to cross-examination by those who in the business know the business, for it is the intent of the law that any inequality which he suffers will be mended by the commission and therefore an exposition of his disadvantages made known to the opposition will be cured by the commission.

It is respectfully submitted that until the proceedings are of this character by the commission that the public will have no confidence

in its hearings. It has already been urged against this method that investigators who may be imposed upon are entirely probable, and that until the proceedings of the commission are fully and completely opened up to the public eye for examination by interested parties and until they are heard thereupon, as contemplated by the law, the public will have no confidence in but will be suspicious of the conclusions of the commission.

In this very case is demonstrated the wisdom of the Congress in requiring the proceedings of the commission to be open. This petitioner appears before the Ways and Means Committee, Tariff Information 1921, Part 1, Page 353 and following. He therein made the same statement that he in effect repeated before the commission on September 10th, as follows:

45 "When importation of dyestuffs into this country was cut off by the war, imports of nitrite of soda also ceased and our dye manufacturers found themselves without adequate supply."

He not only repeated that statement before the commission on September 10th, but emphasized the same to the extent that he claimed that his plant at Seattle had rescued the United States from this perilous position. The truth of the matter is that imports of nitrite during were greater than even before the war; that the production of his plant was not one-sixth of the consumption of the United States during the war.

In the same statement before the Ways and Means Committee he stated: "To date we have invested something over three quarters of a million dollars." In his petition in this case before the commission he raised that amount to \$1,229,500. We are advised, however, upon cross-examination, that he now reduces this amount to \$250,000. Remember, this is an integral factor in the cost of production in the United States on which he has asked increase of this rate of duty to a prohibitive rate. We venture the suggestion that when the figures constituting the \$250,000 investment are exposed to examination, that they will be reduced to at least one-half of that amount!

This very case, therefore, emphasizes the wisdom of Congress in providing that evidence and testimony taken before the Tariff Commission should be under oath, should be in the presence of interested parties, who should have the right to "be heard" thereupon. It will savor, as was contemplated by Congress, of truthful facts being made the basis of our tariff data.

Now, it is respectfully suggested to the commission that it can provide reasonable rules whereby it can still avail itself of the efficiency of its many efficient agents in the field collecting testimony and data and of statements made under oath by the manufacturer or producer in his home, but that when collected before the commission the interested parties should be heard thereupon and

46 have the right to cross-examine all witnesses, including field agents gathering this testimony as to its character and its reliability. The Board of United States General Appraisers for many

years struggled with a kindred proposition until they have finally arrived at satisfactory rules whereby both importer and manufacturer can be heard under them in the matter of imports and the correctness of their invoices. There is not reason why the United States Tariff Commission cannot adopt similar rules. It would but require that true trade secrets be held inviolate and confidential and would eliminate all marks of identity as to persons giving testimony in these cases. But all facts produced which are to be the basis of a new duty should be laid open to interested parties who are to be present at their taking, or at least before final acceptance by the Tariff Commission, be heard thereupon, and to offer evidence in contradiction thereof.

Respectfully submitted,

(Signed)

MARION DE VRIES."

On September 24, 1923, reply to said request was made as follows:

"United States Tariff Commission, Washington.

September 24, 1923.

Messrs. De Vries & Doherty,  
Southern Building,  
Washington, D. C.

GENTLEMEN:

Receipt is acknowledged of your communication of September 11, requesting permission to examine all data obtained by the Commission in its investigation respecting Sodium Nitrite.

Without going into the details with respect to the law or policy in general of revealing confidential information, the Commission calls attention to the fact that it has hitherto obtained its cost data under pledges of confidence, and it therefore cannot violate this pledge of its own motion.

47 Furthermore, the opposition to this application is not in a favorable position to demand cost data from the applicant because the Norwegian companies which control the Norwegian Nitrogen Products Company of New York, according to our information, have refused to give, even confidentially, cost of production data in Norway for Sodium Nitrite when requested to do so by agents of the Commission.

The Commission is informed that the American Nitrogen Products Company, the applicant in this case, agrees to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, will furnish cost data for the Norwegian product. So far as the Commission is informed up to the present time this offer has not been accepted.

Therefore it is deemed impracticable to grant your request that "every particle of evidence gathered by the Commission or its representatives" be disclosed to all interested parties.

Very truly yours,  
(Signed)

THOMAS O. MARVIN,  
*Chairman.*"

On September 16, 1923, there was received by counsel for the Norwegian Nitrogen Products Company an officially transmitted "Summary of Information in the matter of Sodium Nitrite, the Subject of a Public Hearing September 10, 1923, dated September 15, 1923, as follows:

United States Tariff Commission,  
Washington.

September 15, 1923.

De Vries & Doherty,  
Counsellors at Law,  
Southern Building,  
Washington, D. C.

DEAR SIRS:

48 Herewith please find inclosed summary of information compiled by the Tariff Commission in connection with the pending investigation of costs of production of sodium nitrite, for the purposes of Section 315, Title III, of the Tariff Act of 1922.

Very truly yours,  
(Signed)

JOHN F. BETHUNE,  
*Secretary.*

United States Tariff Commission.

"A Summary of Information in the Matter of Sodium Nitrite, the Subject of a Public Hearing September 10, 1923.

"This Summary is information obtained from the public hearing, from publications, correspondence on file in this office, questionnaires sent to manufacturers, and inspection of books and factories of manufacturers by representatives of the Commission, and interviews with persons having personal knowledge of this industry.

"All information in regard to costs of manufacture of individual firms and other information in the nature of trade secrets or processes has been eliminated from this summary, as required by Section 708 of the Revenue Act of 1916, the pertinent provisions of which are as follows:

"Sec. 708. It shall be unlawful for any member of the United States Tariff Commission or for any employee, agent, or clerk of such commission, or any other officer or employee of the United States, to divulge or make known in any manner whatever not provided for by law, to any person, the trade secrets, or processes of any person, firm, co-partnership, corporation or association, embraced in any examination or investigation conducted by said commission or by order of said commission; or by order of any member thereof \* \* \*."

"An opportunity will be given for argument on the record on September 26, 1923, at 10.00 A. M., in the office of the United States Tariff Commission.

49 "An application from the American Nitrogen Products Company requests increase in duty from 3 cents per pound to 4½ cents per pound.

"This application reads as follows: (Same as quoted in deleted form, supra.)

\* \* \* \* \*

"Soda ash is an important material for the manufacture of sodium nitrite by both the arc process and the ammonia-oxidation process. The domestic price on September 10, 1923, for contracts was \$1.45 per 100 pounds in bags at makers' works.

Domestic Production \* \* \*

*Manufacturers and Geographical Distribution.*—The two principal producers of sodium nitrite are the Semet-Solvay Co. of Syracuse, N. Y., which firm uses the ammonia-oxidation process, and the American Nitrogen Products Co., of Seattle, Washington, operating the arc process. The only other producer, the Harshaw, Fuller and Goodwin Co., of Cleveland, Ohio, makes a small quantity of sodium nitrite by the sodium nitrate process.

*Production and Consumption.*—The estimated normal consumption of sodium nitrite in the United States is about 6,000,000 pounds per year. From evidence submitted, domestic producers have plant capacities equal to about 87% of these requirements.

Imports

"Norway and Germany supply most of the sodium nitrite imported. Imports from 1914 to 1921 have varied from 1¾ to 3½ million pounds with the exception of the year 1920, when 11,690,000 pounds were brought in. This very large importation was probably about 25% in excess of the domestic requirements of the abnormally large output of dyes in that year. On an average about 50% of the demand for sodium nitrite in the United States has been supplied by imports. During the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound. During the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound.

\* \* \* \* \*

"The exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds.
Packing .....	\$0.201
Inland freight.....	.026
Ocean freight and insurance.....	.273
Total .....	<u>\$0.503</u>

Deducting these charges, the average price received at the factory in Norway was 4.34 cents per pound.

#### "Exports.

"Sodium nitrite has not been exported from the United States in appreciable quantities.

#### "Foreign Production.

"The Norsk Hydro-Elektrisk Kvaestofaktieselskap of Norway, and the Badische-Anilin and Soda Fabrik of Germany, are the largest foreign producers of sodium nitrite. The Norsk-Hydro has an annual capacity for sodium nitrite of some 24,000,000 pounds. This company uses the arc process. The output of the Radische company is large but figures are not available. This company fixes nitrogen by the Haber ammonia process. The ammonia is converted chiefly into nitric acid and nitrates; sodium nitrite is also obtained in the process as a minor product.

"At the Norsk Hydro plant sodium nitrite together with sodium nitrate are manufactured in connection with the production of calcium nitrate, which is used as a fertilizer. The relative production of the three products is shown in the following table which gives the daily capacity of the principal plant of Norsk Hydro.

\* \* \* \* \*

"The production of sodium nitrite in Germany is also a minor product compared with other products made in the same plant.

"The situation in the United States is quite different. Sodium nitrite is the only product made by the American Nitrogen Products Company, and the production of this commodity by the Semet-Solvay Company represents an independent unit of their plant. This latter company and associated companies, however, make many other important chemicals, including the raw materials necessary for the manufacture of sodium nitrite by the ammonia oxidation process, namely, ammonia and soda ash.

#### "Production Costs.

"Domestic costs of production for sodium nitrite were secured from the American Nitrogen Products Co. and the Semet-Solvay Co.

These costs are not published by the Commission, as they are claimed by domestic manufacturers to be "trade secrets" within the meaning of Section 708 of the Revenue Act of 1916.

"Both the Norsk Hydro of Norway and the Badische Anilin of Germany refused to give investigators of the Tariff Commission access to their cost records relating to sodium nitrite.

*"Estimate of Norwegian Costs."*—In the case of Norway, information was obtained from other sources as to power costs, prices of soda, ash, wage rates and other factors relating to production costs. From such information the Tariff Commission has prepared the following tentative estimate of producing sodium nitrite in Norway:

"TABLE 3.

*"Estimate of Sodium Nitrate Costs in Norway."*

	Kroner per short ton.	Converted cost per 100 lbs.	
		Current exchg. <sup>1</sup>	Par exchange. <sup>2</sup>
Power—2 H. P. years, at 20 Kroner.	40.0	\$0.333	.50
Soda Ash—1 ton at 130 Kroners.	130.0	1.083	1.625
Labor (estimated at 6% of total labor and plant).....	26.0	.218	.327
Sub-total .....	196.2	1.634	2.452
Total Cost (estimated on basis that power, soda, ash, and labor are 75% of total cost) .....	262.0	2.183	3.275 <sup>3</sup>

"Power concessions granted by the Norwegian Government under the Water Power Concession Act show that power has been contracted for as follows:

2). Porsgrund Elektrometallurgiske Aktieselskap at Porsgrund have contracted for 6,000 H. P. at 32 kroners per H. P. year and an additional 4,000 H. P. at 30 kroners.

2). Electro Furnace Products Co., Ltd., at Sauda have contracted for 40,000 H. P. at 32 kroners per H. P. year and have an option on an additional 40,000 H. P. at the same rate.

"An article published in *Teknisk Ukeblad* April 23, 1915, page 229, shows that the larger part of the power in Norway has been developed between 120 and 180 kroners per horsepower. 300,000 H. P. at Rjukan at a cost of 180 kroners would represent an investment of 54,000,000 kroners. The total investment at Rjukan, including

<sup>1</sup> Converted at 6 Kroners to the dollar.

<sup>2</sup> Converted at 4 Kroners to the dollar.

power developments and chemical plants, as published in the 1922 financial statement of the Norsk Hydro is about 66,000,000 kroners.

53 "A sales price for power of 18 kroners per H. P. year would yield a 10 per cent return on the original cost of development. In the estimate given above, however, 20 kroners per H. P. year has been taken as an average price for power.

"Information was obtained that the cost of soda ash in Norway was from 130 to 140 kroners *per metric ton*. The cost of soda ash has been taken as 130 kroners *per short ton*. Slightly less than one ton of soda ash is required for each ton of sodium nitrite produced.

"The basic wage rate in the electro chemical industry is from 1.50 kroner to 1.80 kroner per hour, which rate applies in the plants of the Norsk Hydro. Additions to this rate such as vacation period (2 weeks) with pay make an average wage rate of about 2.0 per hour. From this information and the number of employees the cost of labor has been estimated. Labor is a minor item of costs as the process used in Norway is continuous and automatic to a large extent.

\* \* \* \* \*

#### "Competitive Situation.

"*Power Costs and Efficiency.*—Information obtained by the Commission's investigators tends to show that the cost of power in Norway is considerably less than the price which the American Nitrogen Products Company pays for power.

"In regard to power consumed per unit of nitrogen fixed, information obtained from the American firm when compared with estimates of power consumption in the Norwegian plant *tends to show* that the American firm produces less nitrogen per unit of power than is produced in Norway.

"*Capital Invested.*—Information obtained as to capital investment when compared with capacities *tends to show* that the investment per unit of nitrogen fixed in the case of the American producer for the sodium nitrite plant alone is considerably greater than the unit investment of the Norwegian producer for both sodium nitrite plant and power plant.

54 "The principal market for sodium nitrite is along the Atlantic coast; especially the district adjacent to New York City. The freight rate to this market from the plant of the American Nitrogen Products Company is \$0.85 per 100 pounds and from the plant of the Semet-Solvay Company \$0.34 per hundred pounds. The combined inland and ocean freight plus insurance from the plants of the Norsk-Hydro Company to New York is \$0.30 per hundred pounds.

"Freight charges on soda ash, the principal raw material, to the plant of the American Nitrogen Products Company at La Grande, Washington, are \$0.84 and \$1.35 per 100 pounds from the California and Detroit markets respectively. In the case of Norsk-Hydro in Norway soda ash must be imported, principally from England.

"*Price vs. Quality.*—The quality of the nitrite produced in various

countries and by different processes is equal, so that from a quality standpoint there should be no price differences."

\* \* \* \* \*

On September 26, 1923, the Commission duly convened and the following proceedings were had:

"The Chairman: The hearing in connection with the investigation of sodium nitrite is now open. Are there any parties present who desire to be heard?

Mr De Vries: Mr. Chairman, since the last hearing we have received from the Commission, under date of September 15, 1923, a summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923. In the time allowed, we have not had opportunity to thoroughly examine the same, in the presence of our clients, who are posted upon the facts, nor to get data thereupon from the points wherefrom we have to get it, to wit, Seattle and Norway. We cabled Norway as follows:

Tariff Commission published result investigators' work abroad estimates your cost production at six kroners per dollar at 2.183 per hundred pounds at four kroners per dollar \$3.27½ per hundred pounds deducting from average spring 1923 invoice value of 4.84 per Lb. CIF New York Pasking 0.204 inland freight 0.026 ocean freight and insurance 0.273 hundred pounds total charges 0.503 gives 4.34 per pound at factory this leaves about 100% profit please telegraph your instructions urgent for hearing 26th day of September.'

To which we received the following answer:

'Your telegram 24/9 stop Tariff Commission estimate cost production completely erroneous cost production by far surpasses their estimate stop On principle we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price stop We thus strongly contest investigators' competence stop Your letter 12/9 with minute hearings received today stop No time study same but perusal permits state several Graff's statements regarding our company and process incorrect.'

I want to submit to the Commission that the statute in this case permits interested parties who appear a reasonable opportunity to be present, to produce evidence, and to be heard. We were not given any data collected by the Commission until September 15, 1923, and the few days since, up to the present time, are not sufficient to thoroughly examine and digest the same, and obtain evidence in disproof of that, which we desire to submit.

Commissioner Culbertson: May I ask, Judge De Vries, at the last hearing of this case, were there not present with you in the hearing room three of your clients?

Mr. De Vries: There were—

Commissioner Culbertson (interposing): Would you mind—

Mr. De Vries (continuing): One of my clients, Mr. Culbertson.

Commissioner Culbertson: There were three, however, who were informed to some extent concerning the subject of sodium nitrite.

56 Mr. De Vries: I can speak for but one. I can speak for my own client, Mr. Lodrup. Candidly, Mr. Culbertson, I do not know; I do not recall at the moment of any other parties who were interested. The Norwegian Consul was here. \* \* \*

Commissioner Culbertson: The Commission had no opportunity at that time to get information from your client.

Mr. De Vries: No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting himself to the jurisdiction of this Commission for examination, and without submiting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exaet, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or ~~any~~ other data.

Commissioner Culbertson: My only point is that he was present at the last hearing.

Mr. De Vries: He was.

Commissioner Culbertson: And did not tender any information which he had.

Mr. De Vries: He did not tender any information, and I do not assume that he had any information. I do not think the Commission can rightly assume, for the purposes of this proceeding, that he had any information.

The Chairman: Mr. De Vries, is the assumption correct, that your client knows from personal knowledge the cost of production of sodium nitrite in Norway?

Mr. De Vries: I do not think that assumption is correct. As a matter of fact I know it is not correct, and that answer is fully substantiated by the situation of the plants \* \* \* producing nitrite in Norway and the United States.

57 The Chairman: You made the statement that the time permitted has not given you an opportunity to prepare your case and present evidence in refutation of testimony presented, and to obtain correct information from Norway as to the actual costs of production in Norway.

Mr. De Vries: I did not say—

The Chairman (interposing): Are you asking for an extension of time to enable you to obtain this information?

Mr. De Vries: Yes, sir; I ask for 30 days, deeming that a reasonable extension.

The Chairman: If an extension of time is granted, does the Commission understand that we will receive from you definite figures of the cost of production of sodium nitrite in Norway?

Mr. De Vries: Mr. Chairman, I am not bartering for what I am asking. I am not offering any consideration.

The Chairman: The Commission must know, it seems to me—

Mr. De Vries: I am asking, Mr. Chairman, let it be distinctly

understood, for our statutory rights before this body, without any consideration therefor, except the rights the law affords us, of a fair hearing and a reasonable time to present our testimony, if we may see fit to testify.

Commissioner Culbertson: The question is whether the time is reasonable.

Mr. De Vries: That is the whole question, Mr. Commissioner.

Commissioner Culbertson: That cable you have just read from Norway interests declines to give the information which the Commission would like to have from Norway. Therefore, that cannot be gotten in any length of time. It then comes down to the question of whether or not you have had a reasonable time to examine the information which you now have in your possession.

Mr. De Vries: I do not think that quite accurately measures the situation, Mr. Commissioner. The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway.

Now, the Commission's own report shows that to be true, and proceeds upon the correct principles, to my mind, under the statute, that they gather whatever evidence of cost of production are available in Norway. Now, they have produced certain costs of production in Norway. We say that these proofs that are produced here are not accurate and are not the true costs of production, and we want the right to produce evidence to disprove the figures that are submitted by the Commission. We may disprove it by evidence *aliunde*. We may disprove it by statements from our own factories. That is for us to determine; but the cost of production in these cases, as I read the statute, is not the cost of production of any particular factory, at home or abroad.

If as was suggested upon this particular statute before the Ways and Means Committee, when a similar statute was offered, we undertook to grow pineapples in Maine, and were unsuccessful \* \* \* we could not come in and get an increased tariff rate to grow pineapples in Maine. So the cost of production in Mr. Graff's factory in Seattle is not necessarily the finding upon which this Commission is going to predicate these duties. The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory.

Mr. Graff: Mr. Chairman, am I to understand that the opposition is now asking for additional time in which to produce proof as to foreign costs of nitrite?

The Chairman: That is the nature of the request.

Mr. Graff: And to submit additional evidence along that line. If so, I object, on the ground that the hearing was absolutely closed

on September 10 last. Furthermore, that they had ample time previously, through proper public notice, in which to produce their proof.

The Government expert visited Norway and Germany and other countries for the purpose of ascertaining costs, and had obtained information in so far as they could get it. The Norwegian producers refused to disclose their costs, and if they now come in and ask, through cablegrams, or otherwise, for additional time, after the matter has been discussed in public hearing, I object, of course, to that grant of time.

Mr. De Vries: Of course, Mr. Chairman, in reply to that, we are relying strictly upon the statute. The statute says that in these investigations, the interested parties shall have the right to be present, to produce evidence and to be heard. They shall have reasonable opportunity to be present, and a reasonable opportunity to be heard. That is the language of the statute, to be present, to produce evidence, and to be heard upon the subject of these investigations.

Now, the subject of this investigation is produced to the interested parties under date of September 15, 1923, in which is set forth in detail a tentative cost of production in Norway. We therefore submit that under the statute we have a right to a reasonable time to examine that statement, and if we see fit, to produce evidence, in disputation thereof, or to be heard thereupon.

Commissioner Glassie: Judge De Vries, didn't you have a reasonable time, when you had reasonable ground to anticipate that the results of the inquiry in Norway would be made known, and if they were not to your liking, you could rebut them when they were made known?

Mr. De Vries: Quite true, Mr. Glassie. I am glad you asked the question. You served on our clients a copy of the petition 60 in this case. It set forth that the plant in Seattle represented an investment of \$1,229,500 and asked interest upon it. We spent days and nights, and money, in gathering evidence in disputation thereof, and when we appeared in this tribunal ready to disprove those allegations, we were told that in the secret files of this Commission were other data, and that they were out of the way; so that I say to you——

Commissioner Glassie (interposing): If you prepared yourself to meet a merely collateral issue, which obviously cannot determine the matter in controversy, and failed to prepare yourself to meet the very point in issue, why do you lay the responsibility on the Commission?

Mr. De Vries: I am not laying the responsibility on the Commission. I am laying it on the situation. In answer to that, the only statement of cost was in that petition, that we knew of, of investment and cost that we knew of, and the petition prayed that a rate of duty be fixed that would realize interest upon that statement of cost.

The Chairman: Judge De Vries, according to the statute——

Mr. De Vries (interposing): We cannot tell what we have to meet until it is before us. We did not know what we had to meet in this case until it was before us in this statement.

Commissioner Glassie: You have the first knowledge of your own costs, and that being the issue, ample time being given to you to meet that issue, it seems to me that if you were not satisfied, that was the time to give such information as you possessed.

Mr. De Vries: Our own costs are but half of the case.

Commissioner Glassie: I am referring now entirely to your own costs.

Mr. De Vries: Our own costs are but half the case.

Commissioner Glassie: The people in Norway refused to 61 give direct access, as I understand it, to their books. They knew that the issue was cost, and their cost, the difference between their cost and the American cost, involving their cost. They knew that a hearing was to be had, in which that would be the principal and main issue.

Mr. De Vries: Yes, sir.

Commissioner Glassie: Having declined to give that information, and knowing that the hearing was relating to that issue, it would seem reasonable that they should have come to that hearing prepared to disclose, if they ever intended to disclose—

Mr. De Vries: I do not understand that we have to come forward with any evidence whatsoever, as a condition precedent to enjoying the rights the statute gives us, to be present, in these cases, and to hear the evidence that is produced against us, to produce evidence against that, and to be heard upon that evidence. That is a part of the petitioner's case, to prove his cost of production and that abroad, or for this Commission to investigate and so find, and we have a right to be heard upon that proof, and those findings, under the statute.

The Chairman: Judge De Vries, according to the statute, the issue in this case is the difference in the cost of production. As counsel for one of the parties, you knew months ago that the issue would depend upon, or turn upon the difference in cost of production. The Commission will rule that in its opinion you have had ample time to prepare a statement of costs of production for your clients and meet the issue at the hearings before the Commission, and will decline the request for a further extension of time for hearings in this case.

Mr. De Vries: To that ruling we except.

The Chairman: Very well.

Mr. Graff: Mr. Chairman, I take it for granted that no additional evidence, under that ruling would be permissible in so far as costs 62 on the part of the opposition are concerned. In other words, that the evidence and testimony are supposed to have been closed as of the last hearing.

The Chairman: The motion was served upon the parties in interest that this adjourned hearing on sodium nitrite set for September

26th, would be postponed or adjourned until October 4th. Am I correct?

Mr. De Vries: Yes. We received a notice of that kind.

The Chairman: That is the status of this case at present.

(At this point followed a conference at the Bench between the Commissioners, at the conclusion of which the following occurred:)

Mr. Graff: Mr. Chairman, if the purpose here is merely to extend the time up to October 4th, for final argument, of course, that is entirely satisfactory to us; but if the purpose is to permit the introduction of additional evidence, we again, of course, would object. We think that the opposing counsel's attitude is absolutely absurd. He makes the point that the Government submitted certain information. We neither had access to that information before it was produced. We were exactly on the same basis. They had their opportunity to produce costs, and they refused. We had our opportunity, and willingly granted every access to the Government, to make the investigation. We then testified, produced certain facts, and they cross examined us.

Now, after this has all been done, as I understand it, they come in and ask for permission to produce evidence and rebut our cost evidence, as well as the Government's. I think it is absolutely absurd and should not be granted.

The Chairman: A statement of facts in the possession of the Commission was handed to counsel on each side, and the Commission is of the opinion that a reasonable opportunity to meet the statements submitted as to the facts in the possession of the Com-

mission is proper and right. On October 4 the Commission  
63 will be ready to hear further arguments in this case, and such evidence as counsel have to offer in connection with the statement of facts in the possession of the Commission, which was submitted to counsel.

Mr. De Vries: Now, Mr. Chairman, in reference to October 4th, without waiving our request to grant further time, or to grant 30 days, October 4, I believe, falls on Thursday next.

The Chairman: Thursday is correct, yes, sir.

Mr. De Vries: I wish the Commission could give us a little more time. I want to make what showing can be made in the limited time, without waiving our rights, but I wish the Commission would extend that to the following Monday, for the reason that, as a personal matter, I am compelled to go into a hospital in New York on Monday and will be there until Thursday, and it will be a physical impossibility to meet this situation on the 4th.

Commissioner Glassie: We will be very glad to extend it.

The Chairman: We will be very glad to accommodate you. There is nothing set on that date.

Mr. De Vries: Mr. Chairman, I would like the indulgence of the Commission to make a few formal requests.

As you all know, these proceedings do not concern this case alone. I want to make formal request, as an interested party appearing in

this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to inspect, and to offer in evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers employed,  
and the wages paid in the American Nitrogen Products testi-  
64 mony submitted before this Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit and reasonable opportunity to be heard thereupon.

The Chairman: The request will be taken under consideration.

Commissioner Glassie: How shall we announce our decision on that? It must be done before October 4.

The Chairman: It must be done before October 4.

Commissioner Glassie: You will be notified in writing prior to October 4.

The Chairman: Counsel will be notified in writing by the 4th.

Mr. De Vries: I thank the Commission for its indulgence.

\* \* \* \* \*

The Chairman: If it is agreeable to both parties, the date for the adjourned hearing on sodium nitrite will be fixed for Saturday, October 6th.

Commissioner Glassie: And the same statements made with regard to the 8th will apply to the 6th.

Mr. De Vries: With the understanding, of course, Mr. Chairman, that I except to any date earlier than 30 days from date, as not being a reasonable opportunity. I will be here on the 6th, to comply, in so far as I can, with the Commission's order.

Commissioner Costigan: I do not understand, Judge De Vries, that you have excepted to the 6th of October, but that you except generally to the refusal of the Commission to extend the time  
65 for 30 days, for any further hearing.

Mr. De Vries: Yes; and any longer time than the 6th.

The Chairman: If there are no other parties to be heard, the hearing stands adjourned until Saturday morning, October 6, 1923, at 10 o'clock A. M."

\* \* \* \* \*

On October 3, 1923, there was received by counsel for the Norwegian Nitrogen Products Company, officially transmitted by the Commission, under date of October 2, 1923, a certified copy of the minutes of the Commission's ruling upon the motions of counsel made September 26, 1923. These rulings were announced by the Commission and made part of the record of the public hearing October 6, 1923, and are hereinafter quoted.

"Upon request made by counsel for the Norwegian Nitrogen Products Company on September 26, 1923, at the public hearing in the Investigation (No. 7) under the provisions of Section 315 of Title III of the Tariff Act of 1922, in respect of sodium nitrite, the Commission rules as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

"2. At the adjourned public meeting, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrates and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators on the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted, but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title

VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to  
67 the production costs of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as its asks for an opportunity to cross-examine experts of the Commission with respect to the cost data and other matter obtained by them in the course of the investigations in the field is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

On October 6, 1923, the Commission duly convened pursuant to adjournment to that day, whereupon the following, among other matters, occurred:

"Mr. De Vries: Mr. Chairman, I want to enter an exception to the ruling of the Commission in each and every particular wherein our requests have been denied. Since the last meeting of the Commission we have, in so far as possible, diligently endeavored to gather evidence, by telegram and by cable, in such form as could be obtained in that limited time. We have gathered considerable upon that subject. But the evidence is not completely digested, and in a great measure now is in the hands of the printer, so that we would  
not be able to submit it at this time, but it will be completed  
68 upon Monday. The printers, of course, will not work on Sunday. We have had them working overtime at night in part, and by Monday that work will be completed and we will then be ready to submit what we could gather in that limited time to the Commission.

Mr. McCumber: Mr. Chairman and gentlemen of the Commission: On behalf of the American Nitrogen Products Company, and

for the purpose of facilitating the hearing in this case, we desire to enter an objection at this time to any further testimony being received in this case. We base our objection upon the ground of the record, as it now stands.

As I read the record before this Commission in this investigation, in so far as the matter was directly before the Commission in the hearings here, the Commission closed the testimony upon the 26th day of September. At that time it provided that the parties should file their briefs on the 6th day of October. I refer not only to the briefs but the arguments.

I understand that it is the rule of this Commission that these briefs must be printed and submitted to the parties and to the Commission.

\* \* \* \* \*

The Chairman: The hearings held by the Commission in connection with the investigations into the costs of production are a source of information to the Commission relative to costs in this country and abroad. This hearing for final argument and for presentation of briefs is offered in accordance with the provisions of the law for the purpose of presenting information and seeking evidence and testimony in regard to costs of production of sodium nitrite in this country and abroad. If counsel and parties in interest have evidence to present as to costs of production in the United States or costs of production in Norway, every reasonable opportunity to present that evidence will be afforded.

\* \* \* \* \*

69      Commissioner Culbertson: Judge De Vries, may I ask a question to clarify the situation? Do you expect to offer any testimony this morning through witnesses?

Mr. De Vries: No. All the information which I shall offer the Commission will be printed as a part off the brief.

Commissioner Costigan: It will not be sworn testimony?

Mr. De Vries: No, it will not.

Commissioner Costigan: It will be, however, new material.

Mr. De Vries: It will be in the from of telegrams, cablegrams and answers to them, and copies of official documents which are open to the Commission for investigation. That is all it was possible to secure in the few days we had to secure it.

Commissioner Culbertson: Do you submit them as evidence or as objections to the Commission which are to follow up?

Mr. De Vries: Information in the case. They constain statements of facts which we submit as true.

Commissioner Glassie: Do you wish them to be given evidential value?

Mr. De Vries: As information, yes.

Commissioner Glassie: You say they are supposed to have a probative force?

Mr. De Vries: Yes, they do.

Commissioner Glassie: In determining the action of the Commission?

Mr. De Vries: Prima facie so, Mr. Glassie; and if the Commission doubts them, of course, the Commission can investigate them. I find a rule of the Commission to the effect that papers and documents submitted before this Commission as evidence may be investigated by the Commission, and probably will, as to the probative force. We find, in the other report that you have submitted to us in this case, as a statement of facts found, quotations from scientific journals and from newspapers and other sources of information which the Commission submits as evidence taken before

70 it or information gathered in its investigation. Those things can be replied to by information of equal solemnity, which the Commission has a right to take into consideration, giving them such weight as they see fit, and if they doubt them, they can investigate the authenticity, which is pointed to in the documents themselves.

Commissioner Glassie: It is in the nature of new matter, however, and it is not merely argument on a closed record.

Mr. De Vries: They are both, united in one for convenience of the Commission, Mr. Glassie.

Commissioner Burgess: Is your material in such shape that you could present it to the other side before Monday? I refer to your manuscript.

Mr. De Vries: It is a question of printing, Mr. Burgess.

Commissioner Burgess: I mean in manuscript form.

Mr. De Vries: No; most of it is in the hands of the printer now.

Commissioner Burgess: You have not any duplicate copies which could be handed to the other side?

Mr. De Vries: No, sir. I think Senator McCumber's request to examine these matters in ample time to reply is the right thing under the circumstances. That is the orderly procedure, that either party have ample time to consider what is submitted against it and to answer it, and ample and full time to reply. For that reason I made the point before, and I renew it now, that the few days that were allowed us, six or seven days, are not a reasonable time in which to gather information from Norway and from Seattle in any form of solemnity which should be submitted to a court, or for examination by us and segregation for presentation to this Commission. But we have done our best, and we think we have something that the Commission would be very glad to see. For the convenience of the Commission and all parties we are printing  
71 every bit of it in sufficient numbers so that it may be examined by the Commission and by the other parties to this proceeding. The printing of it will be completed on Monday.

Mr. McCumber: Mr. Chairman, may I be heard upon this one feature of the case?

About one year ago the parties in interest knew of this proceeding. They have had a whole year in which to present anything

they thought was pertinent to the question of cost of production of this article in Norway.

\* \* \* \* \*

Mr. Chairman: Mr. McCumber, the request, as we understand it, is not to reopen the case, but for reasonable time to present evidence which they have gathered or are in the process of gathering, evidence that bears directly upon the issue in this case, that is the cost of production here and abroad. The point is, has the Commission given reasonable time for the preparation and presentation of that evidence? Request is now made, as we understand it, for a continuance of the hearing at least until Monday, in order that the evidence that has been prepared and the brief that has been prepared may be obtained from the printer and presented in due form to the Commission.

\* \* \* \* \*

Mr. De Vries: Just at this juncture, I want to make one suggestion, Mr. Chairman, in reply to some of the things Senator McCumber has said.

\* \* \* \* \*

The statute, which it may be well to read at this juncture, provides that investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings, shall give reasonable opportunities to parties interested to be present, to produce evidence and to be heard.

\* \* \* \* \*

It has been suggested that this case has been pending for one year. That is true, but the interested parties in opposition did not know what case was being prepared. It has taken the Government investigators, most capable men, one year to find the facts that are presented to us to be answered in eight days. The petitioner itself had to file three petitions before he finally settled down to the particular case, and if we are correctly informed of the case here, piece by piece, and the testimony taken in this record, the case he finally rests upon after a year's deliberation and consideration is a vastly different case from the case presented a year ago.

In view of these facts, and the fact that we must go abroad and to the far side of this continent to gather our information, we respectfully suggest that the statute, which gives us the right to be present and to be heard, which the decisions hold means to be heard upon every particle of evidence produced in the case that is not a trade secret or practice, entitles us to more than eight or ten days

to examine and be heard upon the product of the thought of the best minds of the country for a year.

Thereupon counsel for the Norwegian Nitrogen Products Company was permitted to file the brief as requested, Monday, October 8th, and the hearings were on the 6th day of October, 1923, declared closed by the Chairman of the Commission. Upon said record the Commission is now proceeding under said section 315 to make report to the President as the basis of his action upon said petition.

Respectfully submitted,

MARION DE VRIES,  
*Of counsel for the Norwegian  
Nitrogen Products Company,  
Incorporated, of New York.*

73

*Rule to Show Cause.*

Filed December 12, 1923.

\* \* \* \* \*

Upon the consideration of the petition filed in the above entitled case, it is by the court on this 12th day of December, 1923, ordered:

That the above named respondents, the United States Tariff Commission, and Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, constituting the United States Tariff Commission, show cause at a session of this court to be held in the Court House of the Supreme Court of the District of Columbia, in the City of Washington, on the 4th day of January, 1924, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein granting a peremptory writ of mandamus requiring the respondents to forthwith permit the relator and its duly authorized agents, to examine the petition of the American Nitrogen Products Co., Inc., a Corporation, and all data, information, and evidentiary matter on file with the said Commission, or any members thereof, or with any of the investigators, experts, or agents thereof, respecting the cost of producing sodium nitrite at the plant of the said American Nitrogen Products Co., Inc., a Corporation, or elsewhere in the United States, and in foreign countries, and to show cause, if any they have, why a public hearing should not be granted, at which the said relator and any other person, firm or corporation having an interest in the subject

matter and appearing therein, shall have the right and opportunity to cross-examine the duly appointed investigators,

74 experts, agents and witnesses of the said Commission, or any member thereof, who may have supplied any such data, information or evidentiary matter to offer evidence in contravention of any such data, information and evidentiary matter, to be heard thereupon and to present arguments and representations against such petition, or allegations therein contained, or in opposition to or any

part of such data, information and evidentiary matter, and any conclusion which may be made therefrom, and against the probative legal value of any and all such data, information and evidentiary matter relating to the subject of said hearings and on file with said Commission or its members, or any of said investigators, experts or agents:

And respondents are further required to show cause at said time and place, why, in case this court shall refuse such peremptory writ, and order should not be granted directing that an alternative writ issue requiring and directing said respondents to perform the aforesaid acts or to show cause before this court at such time as may be fixed by this court, why a peremptory writ of mandamus should not issue to that effect.

Sufficient reasons appearing therefor, let service of this order be had upon the respondents on or before the 15th day of December, 1923.

WALTER I. McCOY,  
*Chief Justice of the Supreme Court  
of the District of Columbia.*

*Marshal's Return.*

Served a copy of the within rule on each and all personally: December 13, 1923.

E. C. SNYDER,  
*U. S. Marshal.*  
K.

*Answer of the Above-named Respondents to the Petition for Writ of Mandamus and the Rule to show Cause Therein on the 12th day of December, 1923.*

Filed January 4, 1924.

The United States Tariff Commission and Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess and Henry H. Glassie, the Commissioners constituting the United States Tariff Commission, answering, say:

1. Respondents, upon information and belief, admit that the relator, Norwegian Nitrogen Products Company, is a corporation organized and existing under the laws of the State of New York and is engaged in the business of importing sodium nitrite for sale in the United States. But respondents, upon information and belief, aver that relator is not engaged in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States; and that, in respect 76 of the proceedings before the United States Tariff Commission mentioned in its petition for mandamus, the relator

was, and is, acting for and on behalf of such Norwegian manufacturer.

2. Respondents admit that the United States Tariff Commission is a public body created by and existing under the statutes of the United States; that the individual respondents, Marvin, Culbertson, Lewis, Burgess, Costigan and Glassie, are severally the six Commissioners constituting said Commission, said Commissioners, for the purpose of the discharge of their official duties, being located at the seat of government within the District of Columbia; and that the principal office of such Commission is in the District of Columbia.

3. Respondents admit that the power, authority and duties of the said Tariff Commission, and the several Commissioners composing the same, are prescribed, declared and defined by the provisions of Title VII of the Revenue Act of 1916 and by the provisions of the Tariff Act of 1922 mentioned in Relator's petition; but for greater certainty beg leave to refer to the text of said statute.

4. Respondents admit that, in pursuance of the authority vested in him by the Tariff Act of 1922, the President, on October 7, 1922, promulgated an Executive Order in words and figures as set forth in said petition.

5. Respondents admit that, on October 20, 1922, the said Commission promulgated certain Rules of Procedure, among which are the provisions mentioned in Relator's petition, but for greater certainty crave leave to refer to the text of the said Rules, a true copy whereof is annexed to this Answer, marked Exhibit I, and prayed to be read as a part hereof.

77        6. Respondents admit that, on October 30, 1922, the American Nitrogen Products Company, a corporation under the laws of the State of Washington, having its principal office at Seattle in said State by its President and General Manager, C. F. Graff, filed with the United States Tariff Commission an application (called by relator a petition and brief) praying for an increase in the rate of duty imposed by the Tariff Act of 1922 upon imported sodium nitrite from the rate of three cents per pound, as provided in said act, to a rate of four and one-half cents per pound, being the maximum increase of fifty per centum in addition to the rate of duty imposed by said act.

7. Respondents admit that thereafter, having duly considered and inquired into the subject matter mentioned in said application, the United States Tariff Commission, on the 27th day of March, 1923, passed an order whereby it instituted an investigation of the differences in foreign and domestic costs of production of sodium nitrite. Said order is in words and figures as follows:

*"Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922.*

Sodium Nitrite.

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in Paragraph 83 of Title I of said Tariff Act, namely; Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or products of competing foreign countries.

78        "Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in "Treasury Decisions" published by the Department of the Treasury, and in "Commerce Reports" published by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

And ordered further, that public notice of said investigation shall be given by posting a copy of this order for thirty days at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said "Treasury Decisions" and in said "Commerce Reports."

8. Respondents, denying that it or they ordered or instituted such investigation upon the allegations of said application, say that the United States Tariff Commission, having conducted said investigation in the field in accordance with the provisions of the statutes creating, as well as prescribing, defining and declaring the duties of the United States Tariff Commission made, issued and published the order giving notice of the public hearing to be held in such investigation in the words and figures as set forth in relator's petition.

9. Respondents admit that, subsequent to July 20, 1923, and prior to September 20, 1923, the relator, Norwegian Nitrogen Products Company, entered its appearance in said proceedings by counsel and then and thereafter made request of said Commission for a copy of the aforesaid application (called petition and brief) of

said American Nitrogen Products Company. But respondents deny that the grounds and reasons upon which the United States Tariff Commission ordered said investigation to be made and the proceedings therein to be had, are set out in the said application or  
79 petition. On the contrary, respondents say that the action of said Commission in ordering said investigation for the purposes of said Section 315, was not taken in response to, nor was the same based upon or grounded upon, the allegations set out in said application or petition, which was treated in the same manner as other applications are treated by the said Commission, namely, as in the nature of a suggestion only, the provisions of said Section 315 being applied in the public interest and for general public purposes, and not at the suit of private parties in their own private interest. Respondents aver that the action taken by said Commission in instituting said investigation was taken upon the official judgment and determination and responsibility of the persons composing the said Commission in pursuance of their official duties, and after due inquiry, not only into the matters alleged in said application, but also into all other available information and data respecting the advisability or inadvisability, in the public interest, of instituting an investigation into the differences of costs of production of sodium nitrite in the United States and in the principal competing foreign countries, for the purpose of assisting the President in the application of the provisions of Section 315 of the Tariff Act of 1922.

10. Respondents admit that the application (called petition and brief) of said American Nitrogen Products Company was, at the times mentioned, and is now, in the custody of the United States Tariff Commission. But respondents deny that said application is a public record. On the contrary, they aver that said petition or application is in the nature of a suggestion only, drawing the attention of the Commission as in other cases to a supposed condition of non-equalization between the existing customs duty and the differences between foreign and domestic costs of production with a view  
80 to Presidential action under the provisions of Section 315

of the Tariff Act of 1922; that the allegations in said application, as in other similar applications, were made under the protection and sanction of Section 708 of the Revenue Act of 1916, as will hereinafter be more fully shown, and are in respect of all statements concerning methods and cost of production, including material costs, costs of power, labor costs, and other items of cost, of the person, firm or corporation filing the application, essentially confidential and privileged, and entitled to the protection of said Section 708. Respondents further aver that no private right exists, as a matter of course, to the institution of an investigation looking to a change in any rate of customs duty, nor is the United States Tariff Commission bound, by reason of any such application or the allegations therein, whether made under oath or not, to expend the public money or devote the public time to investigations upon the subject matter mentioned therein. Nor is the Commission bound to disclose such allegations to parties claiming to be interested in the increase,

decrease or maintenance of the existing rates of duty on the article mentioned in said application. But respondents aver, that the action of said Commission must be, and is, determined upon considerations of public interest and upon examination of such information as may be available, statistical or otherwise, relevant to the subject matter, and indicating, in the judgment and discretion of said Commission, the advisability or inadvisability of ordering in the public interest an investigation for the purpose of said Section 315. Respondents further aver that, when such an investigation is instituted in the exercise of the Commission's power and authority, the allegations or statements in any application made by any particular individual or corporation in relation to said subject matter, and particularly any statements concerning applicant's methods or costs of production,

are of no lawful concern to any other person or persons claiming to be interested in the subject matter of said investigation, whether as a manufacturer, producer, buyer, seller, purchaser, importer or otherwise.

11. Respondents aver that long subsequent to the filing of said application of the American Nitrogen Products Company and also subsequent to the issuance of the order of March 27, 1923, instituting said investigation (which was not entered upon said application), said Commission sent certain of its special experts, being officers of the United States acting under the sanction of their respective official oaths, to visit and inspect all plants in the United States producing sodium nitrite, including the plants and offices of the American Nitrogen Products Company, and also to visit and inspect all plants known to be producing sodium nitrite in the principal competing foreign countries manufacturing that article. But respondents deny that said Tariff Commission, or its officers, experts, agents or investigators received and accepted from the said American Nitrogen Products Company, *ex parte* and secret information respecting the costs of producing sodium nitrite by said company and in said foreign countries, or that any such information was received in support of allegations made by said American Nitrogen Products Company. On the contrary, respondents aver that all information and cost data obtained from the said American Nitrogen Products Company were obtained in the same manner as from the other companies producing sodium nitrite in the United States and according to the usual practice in such cases in the performance and discharge of official duties. All such data were obtained from the regular and ordinary books of account of the said Company by official experts specially trained, skilled and experienced in that work, and in pursuance of the regular and usual course of procedure pursued under the statutes by the United States Tariff Commission in all investigations conducted by it for the purposes of Section 315 of

82 said Tariff Act of 1922.

12. In further answer to the allegations of this section of relator's petition and the Rule to Show Cause issued thereon, these respondents further say:

(a) That the United States Tariff Commission was created and established by the provisions of Title VII of the Revenue Act of 1918; that in and by the provisions of said Title the general powers and functions of said Commission in respect of the administration, operation and industrial relations and effects of the customs duties of the United States and the conditions, causes and effects relating to competition of foreign industries with those of the United States were declared and established; and in and by the provisions of said Title it was provided that, for the purpose of carrying said Title into effect, the Commission or its duly authorized agent or agents should have access to and the right to copy any document, paper or record, pertinent to the subject matter under investigation, in the possession of any person, firm, co-partnership, corporation or association engaged in the production, importation or distribution of any article under investigation, and should have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, co-partnership, corporation or association to produce books or papers relating to any matter pertaining to such investigation, all of which investigational powers are made subject, as will hereinafter more fully appear, to the condition that it should be unlawful to divulge or make known in any manner whatever, not provided for by law, the trade secrets or processes of any person, firm, co-partnership, corporation or association embraced in any examination of investigation conducted by said Commission.

(b) That, in and by Section 315 of the Tariff Act of 1922, it is provided that, in order to regulate the foreign commerce of  
83 the United States and to put into force and effect the policy of the Congress by said Act intended, the President shall have power, upon investigation to be made by the United States Tariff Commission, to ascertain the differences in costs of production of domestic articles and of like or similar articles produced in foreign countries and to proclaim the changes in classification and increases and decreases in rates of tariff duty which may be necessary to equalize the differences in costs thus ascertained.

(c) That in and by sub-section (c) of said Section 315 it is further provided that, in ascertaining differences in costs of production under the provisions of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation or association in a foreign country; and (4) any other advantages or disadvantages in competition.

(d) That, in and by said Section 315, it is provided that investigations to assist the President in ascertaining difference in costs of production under said section shall be made by the United States Tariff Commission and no proclamation shall be issued by the President until such investigation shall have been made.

(e) That, in making such investigation to assist the President in the exercise of said powers under Section 315 of the Tariff Act of 1922, the Tariff Commission is vested by the provisions of Title VII of the Revenue Act of 1916, supplemented by the provisions 81 of the Tariff Act of 1922, with the power, and is under the necessity, of obtaining as far as practicable, the individual costs of production of the several persons, partnerships, firms, corporations or associations producing the article constituting the subject matter of said investigation and must take said individual production-costs, as far as practicable, directly from the ordinary private books of account of individuals, firms, and corporations, wherein have been recorded, in the usual course of business, all expenditures by said manufacturers for and on account of the immense variety of separate items constituting, and going to make up, the costs of production of such articles; that such inquiry involves taking from said books of account the amount of capital invested by said persons in their said manufacturing plants; the amount of interest, if any, paid upon loans secured for the purpose of manufacture; the amounts paid in each particular purchase for the several species or kinds of materials entering into said manufacture; the amounts respectively paid the several kinds and classes of employees or workmen engaged in said manufacture; the salaries paid to the several officers and employees of said manufacture; the amounts paid the persons employed for expert technical, chemical, research or other scientific and laboratory assistance in such manufacture. Such inquiry further includes the total gross sales of the articles in question and an ascertainment of the direct labor cost, material cost, and overhead cost per unit of the articles produced by each of said domestic manufacturers who are necessarily in competition not only with the foreign, but also with other domestic producers of the same article. It further includes the amounts paid both in detail and in general and by particular units for the selling or marketing expense incurred in placing said article and each unit thereof on the markets for said product.

85 (f) That by section 708 of the Revenue Act of 1916, it is provided:

It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, co-partnership, corporation or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. The commission shall have power to investigate the Paris Economy Pact and similar organizations and arrangements in Europe.

(g) That the several items of individual costs necessary to be taken from the books of each producer and analyzed and collated as in sub-section (c) set out, are in their nature trade secrets of the several persons, firms, co-partnerships, corporations or associations embraced in said examination and investigations; that the disclosure of said items by the Tariff Commission would constitute a direct injury and legal wrong to every such person, firm, co-partnership, corporation or association, inasmuch as it would disclose to his, its or their several competitors the precise elements, trade secrets and processes which constitute its particular advantage or disadvantage in competition, and would thereby permit unlawful and irreparable injury to private property of great value.

13. Further answering, respondents say that, pursuant to the statutes and in conformity with the practice described in the preceding paragraph, the United States Tariff Commission, having instituted the investigation by the order of March 27, 1923, proceeded in said investigation as follows:

86       (a) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to the plants of the three companies known to be producing sodium nitrite in the United States,—namely, the American Nitrogen Products Company, located at Le Grande, Washington; the Semet-Solway Company, located at Syracuse, New York; and the Harshaw-Fuller-Goodwin Company, located at Cleveland, Ohio,—for the purpose of obtaining from the original books of entry of said companies all data required for the ascertainment of the cost of production of sodium nitrite in their respective plants. Said special experts accordingly obtained from each of the said companies, upon cost schedules framed in accordance with accepted accounting practice, the data on their books respecting the actual costs of production of the quantities of the sodium nitrite produced therein, that is to say, the quantity and cost of the several materials used in the manufacture of sodium nitrite by the particular process employed in each factory, as well as the total costs of such materials; the cost of direct labor, skilled, semi-skilled, and unskilled, in the conversion of such materials into the finished product, including such labor cost in respect of each successive stage in such conversion; the details of factory expense involved, including labor and material used in repairs, supplies, power, light and heat and overhead; all amounts disbursed for general expense, including administrative salaries, office expense, research and laboratory and other expenses; fixed charges including depreciation, taxes, both Federal and State and local, insurance, rent where actually paid, interest paid on bonds and short-time loans and other forms of borrowed capital used in the business and the capital actually invested in plant and equipment;

87       selling expense, whether in the form of commissions paid to agents and distributors, or by direct disbursements; total production capacity of the plant; the amount of the gross

sales of all products manufactured by each of said companies, including sodium nitrite, and the amount of the total gross sales of sodium nitrite; the average number of wage-earners employed, the average wage rates for each class of labor employed; the principal markets for the finished product, and the average price received for sodium nitrite by each of said companies for the years 1920 and 1921; the yield of sodium nitrite per pound of the particular material principally used in each plant as indicative of the degree of efficiency of plant operation.

(b) The production-cost data described in the preceding subparagraph (a) and required by the Commission under the authority of section 708, Title VII, Revenue Act of September 8, 1916, supplemented by the Tariff Act of 1922, were furnished by each of the three companies aforesaid and access to and the right to copy all and any documents, papers or records of said companies pertinent to the subject-matter of said investigation, was accorded as required by said Section 708 of said Title VII, upon the conditions and under the sanctions established by Section 708 of said Title making it unlawful to divulge to any person in any manner not provided by law, the trade secrets or processes of any person, firm, co-partnership or association embraced in such examination or investigation. And respondents say that the information and access thus obtained by this Commission was furnished by said companies, including the American Nitrogen Products Company, upon the faith of said statute and upon the consequent understanding, recited in the forms and schedules of the Commission, that the costs of individual persons, firms, or corporations would be held strictly confidential and were for the exclusive use of the Commission and would be published only in

88 such manner as would not divulge the operations of individual manufacturers.

(c) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to Norway (which is the principal competing country in the production of sodium nitrite), for the purpose of obtaining from the books of original entry all data required for the ascertainment of the cost of production of sodium nitrite, and data were sought to be obtained in like manner as in the United States from the offices of the Norsk Hydro-Elektrik-Kvaelstofaktieselskab (Norwegian Hydro-Electric Nitrogen Corporation), located at Kristiania, Norway, the sole company manufacturing sodium nitrite in Norway. Direct access to the books of said corporation, although duly requested, was refused by said corporation, and inasmuch as the United States Tariff Commission was without power to enforce obedience in Norway to its said request, no information or cost data were obtained directly from said manufacturer, though said special experts of the Tariff Commission were permitted to go through the plant of said corporation. Said special experts, however, did obtain, from other sources of a public nature, information relating to power costs in the production of sodium nitrite, prices of soda ash, wage rates, and

other factors entering into the production costs, from which information, combined with published reports and other information respecting the operations of said Norwegian company, an estimate for use in its summary of information hereinafter referred to was made of the cost of production of sodium nitrite in Norway.

(d) Special experts of this Commission, being officers of the United States acting under the sanction of their several official oaths and in the course of their official duties, were also dispatched to Germany,

another competing country in the production of sodium  
89 nitrite, and cost of production data similar to that hereinbefore described were sought to be obtained in the same manner from the offices of the Badische-Anilin und Soda Fabrik Co., located at Berlin, Germany, but access to the books of said company was refused and the experts of the Commission were unable to obtain any further information with respect to the costs of production of sodium nitrite in Germany except data as to wholesale prices at the factory of this company with transportation rates upon said article.

(e) In conformity with the established practice of the Commission, the cost of production data obtained as described were collated and tabulated at the office of the Commission and subjected to analysis and the results of the information gathered by the Commission in such investigation were summarized in a written report or Summary of Information, excluding therefrom only the summary of or report upon such portions of such information as related to trade secrets or processes; and such Report or Summary was made public and furnished to each of the parties in interest appearing in such investigation, including the relator, Norwegian Nitrogen Products Company, during the course of the public hearing in such investigation which, as hereinbefore stated, had been ordered for September 10, 1923, and public notice whereof had been duly published in accordance with the rules of the Commission. In said Report or Summary no figures were given as to production-costs of sodium nitrite in the United States for the reason first, that the individual costs of production of the several plants could not be stated without directly revealing the trade secrets of said producing companies in violation of the provisions of said Section 708, and second, that on account of the limited number of companies producing said article, said production costs could not be stated in the form of averages without revealing in substance and effect the individual production-costs and thereby divulging the trade secrets and processes of said producing companies.

44. Respondents are advised and believe, and therefore aver, that for the United States Tariff Commission, or for any member, employee, officer or agent thereof, to divulge or to make known in any manner whatever, to the Norwegian Nitrogen Products Company, its officers, counsel or agents, or to any other person, the individual costs of production of the American Nitrogen Products Company, would be an offense against the provisions of Section 708 and a misdemeanor punishable by a fine not exceeding \$1,000, or by impris-

onment not exceeding one year, or both, in the discretion of the court, and would further involve the dismissal from office of the six respondents constituting the United States Tariff Commission.

15. Respondents further say, that on September 10, 1923, in accordance with public notice theretofore issued and published, a public hearing in said investigation was held at the office of the Commission in the City of Washington.

(a) At said hearing the relator, Norwegian Nitrogen Products Company, appeared by counsel and was accorded an opportunity to be present, to produce any evidence it had to produce, and to be heard fully and at length upon the questions involved in said investigation; was accorded an opportunity to cross examine, and relator by its counsel did cross examine the only witness appearing in said investigation, namely, C. F. Graff, President and General Manager of the American Nitrogen Products Company, interrogating by its counsel said witness at length concerning the accuracy of statements contained in the application of the American Nitrogen Products Company with regard to the profit earned in the pro-

91 duction of sodium nitrite, the outstanding capital stock of the company, preferred and common, the extent to which said capital stock was paid in, what it represented, what assets were behind it, its present value, and the facts and circumstances respecting a certain alleged suit brought by the minority stockholders of said company, and in general what relator's counsel described as the "financial background of said company"; and further concerning the sale or disposition of a certain plant formerly owned by said company at Lake Bunsen in British Columbia, the ownership of the common stock of a certain Nitro Development Company, the terms, provisions and conditions of an alleged contract between the American Nitrogen Products Company, Nitro Development Company, Graff Construction Company, and C. F. Graff and E. L. Blaine, concerning the construction work of the American Nitrogen Products Company's plant, the commission allowed to the second company on account of said contract, and other matters of detail with regard to said contracts, but without having called on the American Nitrogen Company for the production of said contract and without having given any notice for that purpose and without any offer to submit or produce the papers at the hearing. Relator was permitted to examine the witness with respect to the American Nitrogen Products Company's existing contracts, the last sales made, the prices at which the same was sold, and also with respect to the difference between modes of manufacture in Norway and in the United States. Witness stated that the data submitted to the Commission showed that only the actual investment in the La Grande plant, and not the amount of capital stock issued, had been taken into account in connection with the production costs of the American Nitrogen Products Company.

The witness stated that he was willing to give and did give the cost of investment of the American Nitrogen Products Company's plant at La Grande as included in their figures or

costs of production, and the labor employed there, and did state approximately the investment in said plant and the depreciation thereon, but declined to go into the cost of labor, the cost of power, and the cost of material, all of which witness claimed to be competitive information theretofore furnished the Commission, but information which they did not care to disclose in open hearing to their competitors. And this Commission declined to direct said witness to disclose said information in open session.

(b) At said session of September 10, 1923, the relator by its counsel made a formal request to be supplied with a full and complete copy of the application of the American Nitrogen Products Company without eliminating therefrom any matter, whether deemed by the Tariff Commission to be trade secrets or not. Pending the consideration of this request and the determination as to what portions of the statements made by the American Nitrogen Products Company the Commission would permit relator to examine, relator's counsel stated that they had no testimony to submit.

The hearing was thereupon adjourned to September 26, 1923.

16. Respondents further say that, after the adjournment of the hearing of September 10, 1923, and before the opening of the adjourned session on September 26, 1923, the Commission furnished all parties appearing in said investigation, including relator, with a Report or Summary of Information in which were stated the results of the examination and investigation made by the Commission's special experts, including an estimate of the cost of production of sodium nitrite in Norway, indicating that the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds.
93	
Packing .....	\$0.204
Inland freight .....	.026
Ocean freight and insurance .....	<u>.273</u>
Total .....	0.503

Deducting these charges, said estimate tended to show that the average price received at the factory in Norway was 4.34 cents per pound.

17. At said adjourned hearing on September 26, 1923, relator by its counsel, again appeared and stated that he had received said Summary, that he had transmitted to Norway a cable summarizing the statement of estimated costs of production in Norway, showing 4.34 cents per pound at factory as Norwegian cost of production, and requesting the Norwegian company to telegraph instructions for the hearing on September 26; that in reply relator's counsel had received a cable stating, in substance, that the Tariff Commission's estimate was completely erroneous; that the cost of production by far surpassed their estimate; that on principle the Norwegian company al-

ways refused to publish cost figures and consequently did not furnish the Commission's investigators any information enabling them to calculate cost prices; that said company strongly protested investigators' competence; that the letter from relator's counsel, dated September 9, had been received and that no time had existed to study the same but that perusal permitted them to state that several Graff statements regarding the company and processes were incorrect.

Upon attention of relator's counsel being drawn to the fact that the Commission had been accorded no opportunity to get information from his clients, relator's counsel stated as follows:

91 "No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting himself to the jurisdiction of this Commission for examination, and without submitting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data."

Relator's counsel thereupon requested an extension of thirty days. Being asked whether, if any extension of time was permitted, the Commission would receive from him the figures of cost production in Norway, relator's counsel answered, in substance, that he would not make any promise in that regard. It was thereupon drawn to his attention that, inasmuch as the cable from Norway declined to give the information the Commission desired, no information of the kind could be obtained in any length of time, to which relator's counsel replied:

"The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway."

Said relator's counsel further stated:

"The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory."

Relator's counsel renewed his request for additional time in which to examine and produce evidence of foreign costs of sodium

nitrite, and in disputation of the Commission's Report or  
95 Summary, submitted on September 15, 1923, stating that, although the Norway producers had refused to disclose their costs of production to the Commission, they insisted upon additional time, after the matter had been discussed in public hearing, for the purpose of producing evidence of a general nature on costs of production in Norway; and that relator relied strictly upon the statute. The Commission thereupon ruled that, inasmuch as the Norway producer, knowing that the principal issue at the hearing was the differences between American costs of production and Norwegian costs of production, including their costs of production, had refused the Commission access to their books and declined to give the required information, counsel had had ample time to prepare a statement of costs of production of his Norway clients and meet the issue at the Hearing, the Commission declined to adjourn the Hearing beyond October 6, 1923.

Thereupon relator, by its counsel, made the following formal requests:

I want to make formal request, as an interested party appearing in this case, that we have all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to inspect, and to offer in evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers employed, and the wages paid in the American Nitrogen Products testimony submitted before the Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 96 10, 1923, that we have opportunity to cross examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit and reasonable opportunity to be heard thereupon.

The Commission thereupon took said requests under consideration and stated that the Commission's decision in writing would be sent to the counsel by October 4 and also announced at the adjourned Hearing on October 6.

(e) On October 2, 1923, this Commission transmitted to the relator's counsel, a certified copy of the Commission's Minutes showing the ruling upon the foregoing requests made by the relator's counsel on September 26, 1923. These rulings were announced by

the Commission at the adjourned Public Hearing resumed on October 6, 1923, and are in words and figures as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

"2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the 97 figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of

Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

(f) Respondents further say that, although at the sessions of the Public Hearing held respectively on September 10, September 26, and October 6, 1923, it was announced by the Chairman that the principal matter in question was the difference between production costs in the United States and production-costs in Norway, and although every reasonable opportunity was accorded relator's counsel to present evidence, either openly or in confidence on that question, and although relator's counsel was expressly asked whether he expected to offer any testimony through witnesses, said counsel replied in the negative, and stated that all information which he would offer the Commission would be printed as a part of his brief; that it would not be sworn testimony but would be in the form of telegrams, cables, and answers to them, and copies of official documents; and that such matter was submitted by relator's counsel as information having probative force in determining the action of the Commission, subject, if doubted, to investigation for the purposes of verification.

(g) Respondents further say that on the ninth day of October, 1923, relator submitted and filed with this Commission in the said Investigation, a printed brief of 93 pages wherein, in addition to argument upon the law of the case and upon the facts shown at the Hearings and in the Summary and Report furnished interested parties by the Commission, relator, submitted a mass of documentary evidence respecting the value of the La Grande plant of the American Nitrogen Products Company, the cost of power at said plant, and the estimated cost of production of sodium nitrite in this country and in Norway based upon a comparison of the cost of electrical energy consumed per ton of sodium nitrite produced, and the cost of raw materials and labor entering therein. In the exhibits to said brief,

relator submitted and filed with the Commission printed copies of the following: (1) an amended complaint filed in the Superior Court of the State of Washington for King County, by T. Gladding and other alleged creditors, against the American Nitrogen

Products Company, praying, among other things, for the appointment of a permanent Receiver to take possession and control of the property and assets of said company, (2) a motion for intervention in said suit by certain persons describing themselves as holders of preferred stock of the said American Nitrogen Products Company, and a complaint in intervention filed by said parties, (3) an affidavit of one Christian Tjosovoig claiming to be owner of certain shares of certain preferred stock of said company, (4) an order of dismissal of said action entered in said Superior Court on June 14, 1923, following an alleged agreement entered into by the American Nitrogen Products Company of the first part, the Nitro-Development Company of the second part, and the stockholders of the Nitro-Development Company, parties of the third part, and C. F. Graff and E. L. Blaine as parties of the fourth part, and (5) a balance sheet of the said American Nitrogen Products Company as of June 30, 1919; all of which said documents were submitted by the relator, as shown by said brief, upon the questions of the cost of the plant of said American Nitrogen Products Company, the value of its total possible output, the financial and legal status of that company "as an instrumentality for the upbuilding of the nitrite production in the United States", and the question whether there were rights vested in other parties and corporations having a fixed charge upon the American Nitrogen Products Company in the course of any development thereof "which will render expansion possible for the purpose of the upbuilding and economic production of sodium nitrite in the United States."

18. But respondents aver that neither in its said brief, nor otherwise, did the Norwegian Nitrogen Products Company at any time submit to the United States Tariff Commission, under the sanction of section 708 of Title VII of the Revenue Act of 1916, or in any other manner, any facts, information or data respecting the cost of production of sodium nitrite in the plant of its own company, or its affiliated or associated company, or principal, to wit, the Norsk Hydro-Elektrik Kvaestofaktieselskab, which as respondents are informed and believe, and therefore aver is the sole Norwegian producer of sodium nitrite in Norway.

19. Respondents deny that the purpose of the Hearings ordered by said Commission in said investigation was to ascertain, define or determine whether or not the allegations in the application of the American Nitrogen Products Company were true in point of fact, or whether said allegations as to costs of production in the plant of said Products Company and in the United States and in said foreign countries, supported the contention or claim of said company that nitrite could not be produced in its plant or in the United States for sale in the United States, or that the differences between

the cost of production of sodium nitrite in the United States and in the principal competing foreign country could not be equalized, unless the duty thereon was increased 50 per centum; or whether such allegations supported any contention or claim of the said American Nitrogen Products Company whatever. On the contrary, respondents say that the said Hearings in said Investigation were held pursuant to statute in order to give all parties interested a reasonable opportunity to be present, to offer evidence, and to be heard upon the subject matter of such investigation as instituted by the Commission for the purpose of assisting the President in the determination of the facts necessary to be ascertained for the application, in the general public interest, of section 315 of the Tariff Act of 1922.

101 20. Respondents deny that the allegations in the petition or application of the American Nitrogen Products Company constituted the proper or only subjects of the Hearing ordered by said Commission, or the subject of said Hearing in any sense whatsoever, or that knowledge of the allegations of said application or petition of the American Nitrogen Products Company as to its costs of production was or is in any manner indispensable, prerequisite and essential to the conduct of said public hearings, or any of them, or to the right of the relator to be present, to produce evidence or to be heard thereat or to present arguments upon the subject of said investigation, or to enter into or effectively to participate in any of said Hearings.

21. Respondents are unable either to admit or to deny that relator has a vital or any interest in the subject of said Investigation, or that an increase in duty from 3 cents to 4½ cents per pound, if proclaimed by the President under the law, would constitute an impediment, injury or hindrance to relator's business or would reduce relator's profit upon the sale of sodium nitrite. But respondents are advised and therefore aver that relator's allegations in that regard are irrelevant and immaterial and require no answer inasmuch as the purpose of said Investigation and of the Public Hearings held therein, is to ascertain, for the assistance of the President, and pursuant to law, the true differences between foreign and domestic costs of production, and not the supposed effect of any action predicted thereon upon the private interests of any individual.

22. Respondents further deny that relator had or has a legal right to examine and take a complete copy of the application of said

American Nitrogen Products Company (which respondents  
102 again affirm was not the subject of said investigation), or of  
the allegations therein respecting the costs of producing  
sodium nitrite by said American Nitrogen Products Company; or  
that knowledge of such information was or is necessary for the pro-  
tection of the rights of said relator or to enable said relator to enter  
upon such Hearings and to offer evidence tending to disprove the  
allegations or claims of said American Nitrogen Products Company.

Respondents further deny that said Hearings were ordered for the

benefit of, or upon the petition of the said American Nitrogen Products Company or of C. F. Graff, President and General Manager thereof, but affirm that the said Hearings were ordered as hereinbefore stated. Respondents are advised and believe and therefore aver that the filing of said petition or application by said American Nitrogen Products Company, praying for investigation of the matters therein mentioned, does not make said application of the matters therein contained a public record or in any wise constitute a waiver of lawful right to have said application, in so far as the same includes trade secrets or processes, withheld from the acknowledge of the relator or of any other person, firm, copartnership or association claiming to have an interest in said investigation.

23. Answering generally relator's said petition, respondents say: (a) that the relator, the Norwegian Nitrogen Products Company, and all parties interested in the subject matter of said investigation of the difference of costs of production of sodium nitrite, were given due, timely, and reasonable notice of the institution of such investigation and of the time and place at which the Public Hearing therein would be held; and were accorded reasonable opportunity to be present, to produce evidence, and to be heard at such Hearings (b)

that during the course of said Hearings as aforesaid and with 103 reasonable opportunity to consider and meet the same, a

Report or Summary of all information and data relevant to said inquiry obtained by said Commission or in the possession of the Commission, not in the judgment of the Commission protected under said section 708 of Title VII as trade secrets or processes, was made known to the parties interested and appearing at said hearings including relator; (c) that this Commission, and the Commissioners constituting the same, in the exercise of the powers or duties conferred upon them by law, are vested with power and authority to consider and determine whether information secured by said Commission in the course of an examination or an investigation is or is not in respect of said investigation a trade secret or process of the person, firm, copartnership, corporation or association supplying the same; (d) that their determination, in the course of and for the purposes of, any investigation conducted by the Commission, that any such information is a trade secret is final and conclusive and is not subject to be reexamined, reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review; (e) that to permit such matter to be produced for reexamination and review would of itself constitute a publication and communication of the matter constituting such trade secrets and processes in violation of said statute in such case made and provided; (f) that the relator, having appeared and submitted to the jurisdiction of said United States Tariff Commission, and having formally requested inspection of said original and primary data collected by the Commission's investigators and the original cost and other data collected by the Commission's investigators and the original cost and other data collected by the Commission showing the production costs of domestic manufacturers of sodium nitrite, and its motion

104 in that behalf having been duly heard, considered and decided by said Commission, such decision, made in the exercise of the quasi-judicial power and authority conferred upon it by statute, is also not to be reexamined or reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review on a writ of mandamus; (g) that, inasmuch as relator submitted itself to the jurisdiction of said Commission and moved for an opportunity to cross-examine certain experts of the Commission with respect to cost data and other information obtained by them in their investigation and in the files of the Commission, and inasmuch as such motion had been overruled by the Commission, such decision is also not to be reexamined or reviewed in this Court, and more especially not by way of collateral attack.

And respondents say that for the purposes of said Investigation the determination of all said matters, involving questions of fact and of mixed law and fact, and the application of the law to the fact, has been committed to the United States Tariff Commission by the statutes in such case made and provided, and therefore cannot be made the object of judicial inquiry upon a petition for a writ of mandamus or otherwise, and the determinations of said Commission are not subject to be reversed or overruled or set aside in this honorable Court, nor can said Commission be commanded to proceed or act contrary to its said determination.

24. The respondents further say that the said Investigation of the difference of costs of production of sodium nitrite in the United States and in the principal competing foreign countries instituted for the purpose of assisting the President, is still pending in said United States Tariff Commission, undetermined and undisposed of, and that no report upon said Investigation has been transmitted to the President, nor have any recommendations respecting the same been

105 submitted to the President. Respondents are advised, believe, and accordingly aver that relator's present proceeding is therefore premature and without warrant, inasmuch as no legal right of said relator in the premises, if any it has, has been infringed or affected and inasmuch as relator, if entitled to any remedy, has a full, plain, and adequate remedy by proceedings against the enforcement of any Presidential proclamation altering or adjusting the rates of duty on sodium nitrite after the same has been made by the President and before the expiration of the 30 days intervening between the date of such proclamation and the date when the same can be put into operation.

Respondents say that any matter or thing in said petition contained and not hereinbefore well and sufficiently admitted, traversed, confessed and avoided or denied, is not true to the best of their knowledge and belief, and the same is hereby denied.

Wherefore, having fully set forth the facts constituting the grounds and reasons for the action of the United States Tariff Commission complained of in said petition for mandamus, together with the grounds of its refusal to disclose to relator the individual costs of production and other trade secrets of the said American Nitrogen Prod-

ucts Company, which said petition for mandamus prays that respondents be compelled to disclose, these respondents pray to be hence dismissed.

UNITED STATES TARIFF COMMISSION,

By THOMAS O. MARVIN,

*Chairman.*

(Signed)

THOMAS O. MARVIN,

*Commissioner.*

106

(Signed)

WILLIAM S. CULBERTSON,

(Signed)

DAVID J. LEWIS,

(Signed)

EDWARD P. COSTIGAN,

(Signed)

WILLIAM BURGESS,

(Signed).

HENRY H. GLASSIE,

*Commissioners.*

(Signed) PEYTON GORDAN,

*Attorney of the United States*

*in and for the District of Columbia.*

(Signed) HENRY H. GLASSIE,

(Signed) WILLIAM S. CULBERTSON,

*Of Counsel.*

DISTRICT OF COLUMBIA, ss:

We, Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, being first duly sworn according to law, on oath depose and say that we have read the foregoing answer by us subscribed and know the contents thereof; and that the matters and things therein stated as of our own personal knowledge are true, and those stated as upon information and belief we believe to be true.

(Signed)

THOMAS O. MARVIN.

(Signed)

WILLIAM S. CULBERTSON.

(Signed)

DAVID J. LEWIS.

(Signed)

EDWARD P. COSTIGAN.

(Signed)

WILLIAM BURGESS.

(Signed)

HENRY H. GLASSIE.

Subscribed and sworn to before me this 4th day of January, A. D. 1924.

(Signed)  
[SEAL.]

JOHN F. BETHUNE,  
*Notary Public.*

107                   United States Tariff Commission,  
                         Washington, D. C.

*Executive Order and Rules of Procedure Before the United States  
Tariff Commission under Sections 315, 316, and 317 of Title III  
of the Tariff Act Approved September 21, 1922.*

Executive Order.

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

Application for Investigation.

Application for an investigation under Section 315, 316, or 317 of Title III of the Tariff Act approved September 21, 1922, may be made by any person, partnership, corporation or association.

An application is not required to be in any special form but it must be in writing and signed by or on behalf of the applicant and in the case of an application under Section 316 it must be under oath. Every application must state the name, legal residence, business address, occupation and business connection of the applicant, and contain a short and simple statement of the relief sought and the grounds therefor.

No investigation shall be ordered by the Commission unless such application or preliminary investigation discloses to the satisfaction of the Commission that there are good and sufficient reasons therefor under the law.

If the information contained in the application is deemed by the Commission to be insufficient, the Commission may permit the applicant to amend the same or to submit evidence orally or in writing.

Preliminary Finding under Section 316.

In the case of applications for an investigation under Section 316 the Commission shall consider the application and the evidence submitted therewith with a view to determining whether the entry of any goods shall be forbidden pending further investigation in accordance with subdivision (f) of Section 316.

### Investigations under Sections 315 and 316.

An investigation may be ordered by the Commission under Section 315 or 316 either upon the initiative of the Commission or upon application.

108 The Commission will not be confined to the issues presented in an application but may broaden, limit or modify the issues to be determined.

The Commission shall issue a notice of the nature and scope of any investigation which it may institute under Section 315 or 316 and such notice shall be published in "Treasury Decisions," and in the weekly edition of "Commerce Reports," by one insertion in each thereof.

#### Appearances.

Any person, partnership, corporation or association, showing to the satisfaction of the Commission an interest in the subject matter of an investigation ordered by the Commission, may enter appearance in such investigation in person or by a representative.

### Hearings under Sections 315 and 316.

Parties who have entered appearances in investigations under Sections 315 and 316 shall be notified of the time and place of public hearings by registering and mailing a copy of the notice thereof addressed to each of such parties at the place of business thereof, and at such time and place, except on final hearing, such parties shall be afforded opportunity to offer such relevant testimony, both oral and written as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

Hearings shall be public unless the Commission orders otherwise.

Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers and records of parties in interest. Such further investigation may be had as the Commission shall order.

### Investigations and Hearings under Section 317.

If in any investigation under Section 317 it becomes necessary in the judgment of the Commission to order a hearing a notice shall be given and hearings shall be had, as provided with respect to hearings under Section 315 and 316.

#### Witnesses and Subpœnas.

Witnesses unless otherwise ordered by the Commission shall be examined orally.

The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at any designated place of hearing.

Any member of the Commission may sign subpœnas and members

and agents of the Commission, when authorized by the Commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

The Commission may order testimony to be taken by deposition in any proceeding or investigation at any stage of any such proceeding or investigation. Such depositions may be taken before any 169 person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person, firm, copartnership, corporation or association may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission.

#### Witness Fees and Mileage.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the Commission, shall severally be entitled to the same fees and mileage as are paid for like service in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

#### The Commissioner or Investigator in Charge of Investigations.

The commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes.

#### Briefs.

Briefs may be filed at the conclusion of the testimony in each investigation. The commission or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.

Briefs shall be printed in such form and manner as the Commission shall direct.

#### Final Hearings and Findings.

Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission

being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

#### Appeals under Section 316.

Appeals on matters of law under Section 316 shall be governed by the rules relating to appeals to be taken to the United States Court of Customs Appeals from decisions of the United States Board of General Appraisers.

110            EXHIBIT I. See Page- 3 & 5 of "Answer."

United States Tariff Commission,  
Washington, D. C.

*Executive Order and Rules of Procedure Before the United States Tariff Commission under Sections 315, 316, and 317 of Title III of the Tariff Act Approved September 21, 1922.*

#### Executive Order.

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

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No investigation shall be ordered by the Commission unless such application or preliminary investigation discloses to the satisfaction of the Commission that there are good and sufficient reasons therefor under the law.

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Hearings shall be public unless the Commission orders otherwise

Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers and records of parties in interest. Such further investigation may be had as the Commission shall order.

### Investigations and Hearings under Section 317.

If in any investigation under Section 317 it becomes necessary in the judgment of the Commission to order a hearing a notice shall be given and hearings shall be had, as provided with respect to hearings under Section 315 and 316.

#### Witnesses and Subpoenas.

Witnesses unless otherwise ordered by the Commission shall be examined orally.

The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at any designated place of hearing.

Any member of the Commission may sign subpoenas and members and agents of the Commission, when authorized by the Commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

The Commission may order testimony to be taken by deposition in any proceeding or investigation at any stage of any such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person, firm, copartnership, corporation or association may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission.

#### Witness Fees and Mileage.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the Commission, shall severally be entitled to the same fees and mileage as are paid for like service in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

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The commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes.

**Briefs.**

Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.

Briefs shall be printed in such form and manner as the Commission shall direct.

**Final Hearings and Findings.**

Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

**Appeals under Section 316.**

Appeals on matters of law under Section 316 shall be governed by the rules relating to appeals to be taken to the United States Court of Customs Appeals from decisions of the United States Board of General Appraisers.

113

*Demurrer to Answer.*Filed January 18, 1924.  
\* \* \* \* \*

The demurrer of the above named relator to the answer of the above named respondents by way of demurrer.

The relator, not confessing or acknowledging all or any of the matters or things in said answer contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said answer. And for causes of demurrer sheweth,

That it appeareth by the respondents' own showing by the said answer that they are not entitled to the relief prayed by said answer against this relator.

That it appeareth by the respondents' own showing by the said answer that the relator is entitled as prayed in the petition for writ of mandamus herein to the judgment of this Honorable Court that a public hearing should be granted by said Commission at which the said relator and any other person, firm or corporation having an interest in the subject-matter, appearing in said matter, shall have the right and opportunity to cross-examine investigators, experts, agents and witnesses who may have supplied any such data, information or evidentiary matter to said Commission in said matter, and to offer evidence in contravention of any such data, information and

evidentiary matter, and to be heard thereupon and to present arguments and representations against the petition of American Nitrogen Products Company therein and the allegations therein contained, and against any conclusions which may be made therefrom, and against the probative and legal value of any and all data, information and evidentiary matter relating to the subject of said hearings and investigation on file in said proceeding with the said Commission.

114 Wherefore, and for divers other good causes of demurrer appearing on the said answer, this relator doth demur thereto, and prays the judgment of this Honorable Court, whether he shall be compelled to traverse the said answer, and that said relator have reasonable costs in this behalf sustained.

MARION DE VRIES,  
*Attorney for said Relator.*

DE VRIES & DOHERTY,  
*Of Counsel.*

Service acknowledged.  
PEYTON GORDON.

Jan. 17, 1924.

115

*Memorandum.*

Filed April 18, 1924.

On submission after hearing on petitioner's demurrer to respondent's answer.

This is a proceeding for a writ of mandamus to be issued against the respondents requiring them to permit the relator to

"Examine the petition of the American Nitrogen Products Company and all data, information and evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries, and to show cause, if any they have, why a public hearing should not be granted, at which the said relator and any other person, firm or corporation having an interest in the subject-matter, appearing therein shall have the right and opportunity to cross-examine investigators, experts, agents and witnesses who may have supplied any such data, information or evidentiary matter, to offer evidence in contravention of any such data, information and evidentiary matter, to be heard thereupon and to present arguments and representations against said petition, the allegations therein contained, and any conclusions which may be made therefrom, and against the probative and legal value of any and all data, information and evidentiary matter relating to the subject of said hearings on file with the Commission, upon which the said American Nitrogen Products Company prays that said Commissioners, respondents herein, recommend to the President that the duty of three (3) cents

per pound on the importation of sodium nitrite, as presently fixed by law, be increased to four and one-half ( $4\frac{1}{2}$ ) cents per pound, under the provisions of the Tariff Act of 1922."

From the pleadings it appears that the relator is a corporation organized and existing under the laws of the State of New York, engaged in the business of importing sodium nitrite for sale within the United States, but according to the respondents' answer, upon information and belief in this respect, the relator is not in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States, and in the proceeding before the respondent Commission herein-after referred to, the relator was and is acting for and on behalf of such Norwegian manufacturer.

The importance of the case was asserted by counsel for the respective parties in the arguments at the bar. The exhaustive character of those arguments, the ability with which they were made, and the case itself, would warrant this court in fully setting forth the grounds and reasons for the conclusion reached, but the importance to both the relator and the respondents of an early disposition of the

litigation, at least so far as this court is concerned, and the 117 exactions of manifold judicial duties pressing upon the court, necessitate a comparatively brief statement of the reasons for its conclusion.

The controversy presented by this proceeding arises out of an investigation undertaken by the respondent Commission, of the differences of costs of production and of other facts and conditions enumerated in Section 315 of title 3 of the Tariff Act of 1922, with respect to sodium nitrite, wholly or in part the growth or product of the United States, and of and with respect to this substance, wholly or in part the growth or product of competing countries. The investigation was stimulated or suggested by a petition filed on October 24, 1922, by the American Nitrogen Products Company of Seattle, Washington, in which it sought an increase of the duty upon imported sodium nitrite from three cents per pound, as prescribed by the Tariff Act of 1922, to  $4\frac{1}{2}$  cents per pound. On July 20, 1923, the respondent Commission by an order adopted as of that date, gave notice of a public hearing, to be held on September 10, 1923,

"at which all persons interested will be given an opportunity to be present to produce evidence, and to be heard with regard to the differences in cost of production," etc.,

of sodium nitrite.

Before the date of the hearing so fixed by the respondent Commission, the relator herein, by its counsel, appeared in the proceeding or investigation thus instituted by the Commission, and 118 requested a copy of the petition filed by the American Nitrogen Products Company. This was furnished, with certain

deletions made by the Commission, and at the public hearing so ordered, and after it had begun, the questions raised by the pleadings in the pending case, were presented, and the respondent Commission ruled on them at an adjournment of the hearing, the adjourned hearing taking place on October 6, 1923. These rulings appear on pages 66 et seq. of the printed petition herein. From an inspection of these rulings it will be observed that the Commission refused the application made by the petitioner for leave to its counsel to inspect certain data collected by the Commission, as well as certain data submitted to the Commission by the American Nitrogen Products Company, and the data thus furnished is the data that the relator seeks to obtain access to by the writ of mandamus.

It is to be noted in passing that a domestic manufacturer is seeking to obtain an increase in the tariff duty on sodium nitrite, and the relator is an American corporation engaged in the business of *importing* this product for sale within the United States. It is therefore engaged in competing, in the United States, with domestic manufacturers of the same product.

The respondent Commission was created by the Revenue Act of September 8, 1916, and its principal duties are set forth in sections 702-703 and 704 of the said Act. By Section 702 it is provided that it shall be the duty of the Commission

"to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs law, and, in general, to investigate the operation of customs laws, including their relation to the Federal revenues, their effect upon the industries and labor of the country, and to submit reports of its investigations as hereafter provided."

By section 703 it is, *inter alia*, provided

"That the commission shall put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress."

By the Tariff Act of September 21, 1922, and by subsection (a) of Section 315 thereof it was enacted

"That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the

growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and pro-

claim the changes in classifications or increases or decreases  
120 in any rate of duty provided in this Act shown by said as-  
certained differences in such costs of production necessary  
to equalize the same",

and by sub-section "c" of said Section 315, it is prescribed, *inter alia*,

"That in ascertaining the *differences in costs* of production, under the provisions of sub-divisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made.

The commission shall give reasonable public notice of its hearings and *shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.*

The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." (Underscoring supplied.)

While there are other provisions of law that it would be useful to quote, and which must be considered in the disposition of the case, neither time nor space permits this to be done. For present purposes it is enough to point out that the Tariff Commission is ex-

clusively an investigating and fact-finding body, the results  
121 of whose investigations are primarily intended for the information and use of the President, Committees of Congress, and of Congress itself, and particularly, in carrying out the policy of Congress as it finds expression in the Tariff Act of September 21, 1922, it is an aid to the President in securing information that he should possess in order to exercise the important power and authority, somewhat legislative in its character, conferred upon him by section 315 of the Tariff Act last mentioned. And, while it is true

that it is on occasions, required to hold public hearings, to give parties interested a right to be heard, and to prevent evidence relating to the subject matter of its investigations, it is a serious question whether these requirements of the statute change, or are intended to change the essential character of the Commission as an investigating and fact-finding body, and while parties interested are by terms of the applicable statutes entitled to be heard and to present evidence, it would, it seems, be going too far to say that interested parties appearing in such investigations, and whose interests may conflict on questions as to whether a given tariff duty should be increased or reduced, stand in the position of litigating parties, entitled to invoke Constitutional rights and safeguards applicable wherever it can be said that a question of due process of law is involved. Of course domestic manufacturers of products who

122 encounter the competition in the United States of foreign manufacturers, their agents and representatives in this country,

and citizens of the United States engaged in the business of importing and selling within the United States, the same product, are interested parties, with respect to Tariff duties laid thereon, but neither have any property right, in the usual sense of that term, in an existing tariff duty, with reference to which they are at all times subject to the will of Congress, who may prescribe a duty, modify a duty already prescribed, or remove it altogether and thereby place such product on what is sometimes called the free list. Bragg vs. U. S., 2 Court of Customs Appeals, 22, 23, 24. Buttfield vs. Stranahan, 192 U. S. 470, 492, 493.

The respondents resisted the demands of the relator in this case, upon the main grounds that to afford the relator access to the data demanded by them, would be to violate assurances given by them to those who supplied them with confidential information regarding their business, and would also reveal trade secrets.

The protection of trade secrets or processes has been something that the Courts of the country have generally safeguarded, and have enjoined those who would reveal them. So late as February 18th of this year, the Supreme Court, through Mr. Justice Holmes, delivered an opinion in the case of United States ex rel Saint Louis Southwestern Railroad Co., vs. The Interstate Commerce Commission, et al., No. 398, October term, 1923. In that case it appeared

123 that the Interstate Commerce Commission had made a tentative valuation of the relator's property and had served it with a copy of the valuation. The relator protested the valuation, and thereupon the Commission ordered a hearing upon the subject. Before the hearing took place the relator filed a motion with the Commission praying for an order

"allowing it to examine the underlying data upon which the valuation was based and for a subpoena duces tecum to named officers of the Commission directing them to bring with them to the hearing all the data in any way relating to the matter in issue."

The Commission thereupon canceled the hearing and made an order in which, *inter alia*, it denied inspection of "cost information secured from others than the carrier in question". Thereupon the relator presented its petition for a writ of mandamus to this Court, which petition was dismissed, and the case finally reached the Supreme Court. In the course of its opinion that Court declared that

"if Congress had given no hearing before the Commission but still had made its conclusions *prima facie* evidence of value, it would be hard to say that any Constitutional rights of the railroads had been infringed."

The Court considered the statute under which the Interstate Commerce Commission was acting, and referring to provisions of the statute prescribing a hearing before the Commission, declared that

"the hearing to be sure is not of the ordinary kind. The railroads have no adversary. The Commission of course has no object except to arrive at the truth. It is not to be cross-examined for bias 124 or otherwise as to its capacity to decide or modes of deciding what is entrusted to it, but on the other hand since it must grant a hearing manifest justice requires that the railroads should know the facts that the Commission supposes to be established and we presume that it would desire the grounds of its tentative valuation to be subjected to searching tests. But there are necessary limits. While there can be no public policy or relation of confidence that should prevail against the paramount claim of the roads the work of the Commission must go on, and cannot be stopped as it would be if many of the railroads concerned undertook an examination of all of its papers to see what they could find out."

It is to be observed that this case involved property of the relator railroad, a valuation of which, when made final, would be *prima facie* evidence in various judicial proceedings in which the value of the property is material to the disposition of the case.

In the instant case the investigation undertaken by the Tariff Commission, is for the purpose of providing the President with information which would aid him in determining whether an existing Tariff duty should be altered.

In two later cases, decided together on March 17, 1924, those of the Federal Trade Commission vs. The American Tobacco Company, and the same Commission vs. P. Lorillard Company, Incorporated, Nos. 206 and 207, October term, 1923, the Supreme Court had before it petitions for writ of mandamus brought by the Federal Trade Commission against the defendants in order to require them to produce certain records, contracts, memoranda, and correspondence 125 for inspection and making copies. The petitions were denied by the District Court and in the course of its opinion, also delivered by Mr. Justice Holmes, the Court declared:

"Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to

authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission vs. Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the *possible revelation of trade secrets*, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman vs. Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States vs. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335." (Underscoring supplied.)

It is noted that in these cases the situation was rather the reverse of what is presented in the case at bar. There the Federal Trade Commission was desiring to secure access to the records of the companies engaged in the manufacture and sale of tobacco, and the Commission proceeded, as it conceived it had a right to proceed, under the Act of September 26, 1914 and in pursuance of a resolution of the Senate passed August 29, 1921, the resolution directing the Commission to investigate the tobacco situation as to domestic

and export trade with particular reference to market prices  
126 to producers, and the Act under which it proceeded, directs

the Commission to prevent the use of unfair methods of competition in commerce and authorizes it, and in a proper case, to order desistence of the use of prohibitive methods. In the instant case we have the Tariff Commission obtaining information and data in confidence, and which information and data involves, it is claimed by respondent Commission, trade secrets, if not trade processes, as well, and the Commission is doing this for the purpose of supplying the President with information upon which he might act in altering a tariff duty.

It is not asserted that the cases thus referred to are decisive of the pending one, but they certainly point to underlying principles which have their application here, and perhaps for even stronger reasons than those involved in the first case cited.

The relator claims in the broadest form, the right, which it insists is given to it by the law under which the respondent Commission operates, to have an opportunity to examine

"every particle of evidence gathered by the Commission or its representatives,"

and to offer evidence in contradiction thereof

"before judgment of the Commission is rendered thereupon."

It further contends that the evidence to which it demands access contains no trade secrets, within the legal meaning of the term.

Attention has already been called to the evident fact that  
127 there is a struggle on between at least one domestic manufacturer of sodium nitrite and the relator, who claims to be engaged in the importation and sale within the United States of the same article of commerce made abroad, over a tariff duty. But the pleadings, in the opinion of the Court, reveal that the relator is really acting as a selling agent for at least one foreign manufacturer of the product mentioned. Not only is this the information that the respondent Commission has on the subject, but on pages 55 and 56 of the relator's printed petition it appears that during the hearings before the Commission, counsel for the relator informed the Commission that "we cabled Norway as follows", and then the cable is given, this cable informing "Norway" of the result of the work of the Commission's investigators abroad as to "your cost production", etc. And he also read into the record of the hearing the reply to the cable, which reply contains, among other things, the following:

"On principle we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price."

Among the data that the relator demanded access to from the respondent Commission, and now asks this Court, by its writ of mandamus, to compel the Commission to permit, is

"the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries."

Thus it appears that in an investigation undertaken by the  
128 respondent Commission to ascertain, among other things, "the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries" (Sub-sections *a* and *b*, Sect. 315, Tariff Act of September 21, 1922),

we find the relator, on behalf of one or more foreign manufacturers of sodium nitrite, demanding access to data confidentially supplied to the Commission by domestic manufacturers, although its principal or principals have, "on principle," refused to supply the Commission, even in confidence, with the same sort of information. Considering the nature and purpose of the Commission's investigation, this attitude of the relator's principal or principals is not encouraging. It is true that neither the relator nor its principal or principals make any concealment of their attitude in this respect, but stand upon what they claim is their legal right, given, to them, they insist, by applicable and controlling statutes. In the opinion of the Court, it must be very clear that the Congress intended by its enactments to accord such rights, where the assertion of them under the facts of this case, produces the incongruous situation that has been

pointed out. Indeed, if the relator is right in its contentions, it would seem as if the purposes of the Congress could be defeated by the attitude assumed in this case by the relator and its principal  
or principals, and this too at the expense of the domestic  
129 manufacturer and to the advantage of the foreign manu-  
facturer, a state of affairs that it is almost inconceivable  
to think that Congress could have intended, when the policy of  
revenue measures designed to give legal effect to the principles of  
so-called protective tariff legislation, is considered.

Something should be said on the contention made by the relator that its demand does not call for the disclosure of trade secrets. In this regard we find the respondent Commission and the American Nitrogen Products Company declaring that certain of the information, access to which is demanded by the relator, is information con-  
cerning the latter's trade secrets and those of other companies like-  
wise engaged in manufacturing sodium nitrite.

Section 708 of the Tariff Act of September 8, 1916, makes it un-  
lawful for any member of the United States Tariff Commission or  
for any of its employees

"to divulge, or to make known in any manner whatever not pro-  
vided for by law, to any person, the trade secrets or processes of any  
firm, copartnership, or association embraced in any examination or  
investigation conducted by said commission, or by order of said com-  
mission, or by order of any member thereof,"

and it penalizes a violation of the section by fine or imprisonment or both. On behalf of the Commission it is insisted that the informa-  
tion and data, access to which it denied the relator, consists of trade  
secrets. The relator of course insists that it does not.

130 The information and data thus furnished consists in part,  
at least, of the original cost and other data collected in the  
field by the Commission's investigators, the figures showing the de-  
tails of individual costs of production obtained by the Commission  
under the sanction of Section 708 of the Tariff Act of September  
8, 1916, and original data showing the production costs in respect  
of labor of the American Nitrogen Products Company submitted by  
or obtained from the said company under the section mentioned.  
Also original data relating to the production costs of the said Pro-  
ducts Company, similarly submitted or obtained from it. The Com-  
mission also denied to the relator permission to cross examine its ex-  
perts with respect to the cost data and other matter obtained by them  
in the course of their investigations in the field.

In the main, the relator insists for a construction of the words  
"trade secrets" as would confine their use to secret formulas or pro-  
cesses not patented and used in compounding some article of com-  
merce or trade, and there are not wanting decisions which, at least,  
incline so to confine or limit the applications of the phrase, but the  
weight of modern judicial authority, in the opinion of this Court,  
is against so narrow a construction. It seems to the Court that the

cost of production of manufactured articles may vary in the proportion to the skill and acumen of individual manufacturers. To illustrate, it is altogether supposable that a given manufacturer or 131 manufacturing concern may so organize his or its production processes as to bring about the greatest efficiency of results as a cost below that which another manufacturer or manufacturing concern of like size and engaged in producing the same article or articles of trade as the former, would be able to do. They are competitors, but the manufacturer whose greater skill and acumen has lowered the cost of production over that of his adversary has an advantage over the latter which, in fairness, it may be said he has justly earned. Is it the right of the less skillful manufacturer to possess himself by a compelled disclosure of the methods and processes of the more efficient competitor, and thus impair the advantage of the latter in the competitive struggle? It is conceivable that the abler manufacturer may have accomplished his superior position in part by wages, hours, and conditions of labor, and by reducing his labor turnover. These factors he may be successful in concealing from his competitors, and why may not these methods of his under such circumstances, be justly regarded as "trade secrets"? Of course, in these days of labor union rates of wages, hours and conditions of labor, this may be an increasingly difficult thing for a manufacturing employer to accomplish, but so long as he is able to do so, is it unjust that the methods he employs be withheld from the knowledge of his competitors? Furthermore the superior ability of one manufacturer over another engaged in the same line of manufacture, which results in a lower cost of production for the former increases the good will of his business, and this good will is a property right which the law will protect and it enters very largely into the price he will receive in a sale of his manufacturing enterprise. Some of the views thus expressed are illustrated in such cases as *The International News Service vs. Associated Press*, 248 U. S. 215-236, *Board of Trade vs. Christie Gran and Stock Company*, 198 U. S. 236-250, *Witkop vs. Boyce*, 61 Misc. 126, 12 N. Y. Sup. 1847, *Crocker-Wheeler Co., vs. Bullock*, 134 Fed. 241-242-256, and *U. S. vs. Basic Products Co.*, 260 Fed. 472-482.

More might be written on this interesting subject but the Court at the outset of this memorandum stated that it would undertake to state only *some* of the reasons which has led it to the conclusion that relator's demurrer to the answer of the respondent must be overruled.

And it is so ordered. . .

F. L. SIDDONS,  
*Justice.*

April 18th, 1924.

133

*Order Overruling Demurrer and Judgment*Filed April 28, 1924.  
\* \* \* \* \*

1. This cause came on to be heard upon the demurrer of the relator, the Norwegian Nitrogen Products Company, to the joint and several answers and return of the respondents, and the petition for a writ of mandamus herein, and was argued by counsel for the respective parties and all of said matters considered by the Court. Whereupon it was on the 21st day of April, 1924, by the Court adjudged and ordered that said demurrer be and the same was overruled.

2. Whereupon the relator by its counsel in open Court, having elected to stand upon its said demurrer to the said return, it is by the Court this 26th day of April, 1924, adjudged, ordered and decreed that the prayer of said petition for a writ of mandamus be and the same is hereby denied and the said petition dismissed.

By the Court:

F. L. SIDDONS,  
*Justice.*

And due exception being noted and allowed the relator prays an appeal to the Court of Appeals from the foregoing judgment and asks that the amount of penalty on bond be fixed which is accordingly allowed and done, and the penalty in said bond for 134 costs of appeal is fixed at one hundred dollars.

By the Court:

F. L. SIDDONS,  
*Justice.*

O. K.

PEYTON GORDON,  
*United States Attorney.**Memorandum.*

April 28, 1924.—Appeal bond (cost) \$100 filed.

135

*Assignment of Errors.*

Filed May 5, 1924.

The Trial Court erred as follows:

1. In overruling Relator's demurrer herein to the return and answer of respondent's petition for a writ of mandamus and the rule to show cause thereon made on the 12th day of December, 1923.

2. In holding as a matter of law that all costs of production, and all items thereof, are trade secrets or processes within Sections 315

and 318 of the Tariff Act of 1922, and Title VII of the Revenue Act of 1916, as alleged in said answer.

3. In holding as a matter of law that costs of materials are trade secrets or processes within the provisions of law cited in (2), supra, as alleged in said answer.

4. In holding as a matter of law that costs of labor are trade secrets or processes within the provisions of law cited in (2), supra, as alleged in said answer.

5. In holding as a matter of law that costs of power are trade secrets or processes within the provisions of law cited in (2), supra, as alleged in said answer.

6. In holding that evidence gathered from public sources in Norway, by the United States Tariff Commission, and in the custody of the Commission as such and upon which it is proceeding to 136 final action in the above entitled matter, are trade secrets or processes within the provisions of Sections 315 and 318 of the Tariff Act of 1922, and Title VII of the Revenue Act of 1916, as alleged in said answer.

7. In holding as a matter of law that evidences of costs of labor procured from public sources in Norway as and in the manner and now before said Commission as such, as stated in (6) supra, were likewise, as therein stated, trade secrets or processes within the provisions of law therein stated, as alleged in said answer.

8. In holding as a matter of law that evidences of costs of materials gathered from public sources in Norway as and in the manner and presently before said Commission as such, as in (6) supra stated, are trade secrets or processes within the provisions of law therein stated, as alleged in said answer.

9. In holding as a matter of law that evidences of costs of power gathered from public sources in Norway as and in the manner and presently before said commission as such, as stated in (6) supra, are likewise trade secrets or processes, within the provisions of law therein stated, as alleged in said answer.

10. In holding as a matter of law that relator was not entitled to cross examine Mr. C. F. Graff, and declining to direct him to disclose information, as to any one of the costs,—costs of labor or costs of power or costs of materials employed by him in the manufacture of nitrite in the plant of the American Nitrogen Products Company at Seattle, upon the grounds and for the reasons stated by said respondents in 15 (a) of said answer, that such evidences related to "competitive information" furnished said Commission; and in holding in this behalf that disclosure of "competitive information" by said Commission is by any act of Congress prohibited from inspection as alleged in said answer.

11. In holding as a matter of law that the eight days allowed by the said Commission afforded relator a "reasonable time," as provided by Section 315 of the Tariff Act of 1922, within which to collect, collate and introduce evidences, from Seattle, U. S. A. and Norway, before said Commission in rebuttal or disproof of the "summary of facts" submitted and disclosed to relator by U. S. mail September 15, 1923, for the first time, as a "*part of the public hearing*" of September 10, 1923," as alleged in said answer.

12. In holding that as a matter of law the right accorded by Section 315 Tariff Act of 1922, that parties interested appearing in said proceedings "shall be given reasonable public notice of its hearings" and "reasonable opportunity" to be present, to produce evidence, and to be heard," does not give such parties the right to inspect or be confronted with any of the evidence gathered by the Commission upon which it is proceeding to action, be that evidence of costs of power, or costs of materials, or costs of labor, or any other elemental costs of production as alleged in said answer.

13. In holding as a matter of law that evidence of costs of power and costs of labor and costs of materials and other costs of production, collectively and separately, are evidences of trade secrets or processes within the language of Section 708 of Section 318 of the Tariff Act of 1922, as alleged in said answer.

14. In holding as a matter of law, under said Section 315, that relator was not entitled to inspect, for the purposes of offering evidences upon and being heard upon the petition, and the whole thereof, not in fact and in law statements of trade secrets, of the American Nitrogen Products Company, which said petition moved said proceedings for the purpose of either excluding relator from the trade and commerce of the United States or seriously impairing relator's competitive capacity therein.

15. In proceeding to decision upon and overruling said demurrer to the petition praying relief under an act of Congress without first having determined whether or not the statutory remedy sought by the petition herein was accorded by any Act of Congress nor inhibited by the Constitution of the United States, due request in writing therefor having been duly made of said Honorable Court.

MARION DE VRIES,  
*Attorney for Relator.*

DE VRIES, DOHERTY, DAVIS & LAMB.  
*Of Counsel.*

Due service of a copy of the above assignment of errors acknowledged this 5th day of May, 1924.

PEYTON GORDON,  
By M. P. M.,  
*Attorney for Respondent.*

138

*Designation of Record.*

Filed May 5, 1924.

The clerk will please make up a transcript of the record in the above entitled cause for the appellant to file in the Court of Appeals of the District of Columbia, and include therein the following:

1. Petition for Writ of Mandamus.
2. Rule to show cause thereon on December 12, 1923.
3. Answer of respondents to said petition and rule to show cause.
4. Demurrer of relator to said answer.
5. Order of the Court overruling said demurrer, made April 18, 1924, including memorandum by the court made upon making and constituting a part of said order.
6. Order overruling demurrer, and judgment.
7. Notation of Appeal bond.
8. Assignments of Error.
9. Designation of Record.

MARION DE VRIES,  
*Attorney for Relator.*

DE VRIES, DOHERYT, DAVIS & LAMB,  
*Of Counsel.*

Due service of a copy of above Designation of Record acknowledged this 5th day of May, 1924.

PEYTON GORDON,  
By M. P. M.,  
*Attorney for Respondent.*

139      Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 138, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 68310 at Law, wherein United States of America ex rel. Norwegian Nitrogen Products Co. Inc., is Relator and The United States Tariff Commission and Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, Constituting the United States Tariff Commission, is Respondent, as the same remains upon the files and of record in said Court.

In testimony where of, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 20th day of May, 1924.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,

*Clerk,*

By W. E. WILLIAMS,

*Assistant Clerk.*

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4168. United States of America ex rel. Norwegian Nitrogen Products Co., Inc., appellant, vs. The U. S. Tariff Commission. Court of Appeals, District of Columbia. Filed May 21, 1924. Henry W. Hodges, clerk.

(3169.)

## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

No. 4168

UNITED STATES OF AMERICA ex Rel. NORWEGIAN NITROGEN  
PRODUCTS CO., INC., Appellant,

vs.

THE UNITED STATES TARIFF COMMISSION, THOMAS O. MARVIN,  
WILLIAM S. CULBERTSON, DAVID J. LEWIS, et al.

ARGUMENT AND SUBMISSION—Jan. 5, 1925

The argument in the above entitled cause was commenced by Mr. Marion DeVries, attorney for the appellant, and was continued by Messrs. Peyton Gordon and H. H. Glassie, attorneys for the appellees and was concluded by Mr. Marion DeVries, attorney for the appellant. On motion, both sides are allowed to file additional authorities.

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## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

Before Robb and Van Orsdel, Associate Justices and Smith, Judge  
of the United States Court of Customs Appeals

OPINION—Apr. 6, 1925

Judge JAMES F. SMITH delivered the Opinion of the Court:

SMITH, Acting Associate Justice:

This is an appeal from a judgment of the Supreme Court of the District of Columbia denying relators' petition praying for a writ of mandamus against the United States Tariff Commission.

Section 315 (a) of the tariff act of 1922 empowers the President to ascertain by investigation the differences in cost of production between articles, the growth and product of the United States and like or similar articles, the growth and product of competing foreign countries. If that investigation develops that the duties fixed by the act do not equalize such differences the President is authorized to determine and proclaim the changes in classification or the increases or decreases in the rates of duty provided by the act necessary to equalize foreign and domestic costs of production. Changes in classification and increased or decreased duties so proclaimed by the President take effect under the act within 30 days after the date of their announcement by the President.

Subdivision (e) of section 315 expressly provides that no proclamation shall be issued by the President changing the classification or increasing or decreasing duties until after an investigation of the differences in cost of production has been made by the United States Tariff Commission. That subdivision makes it the duty of the Commission to give public notice of its hearings and to afford to parties interested a reasonable opportunity to present, to produce evidence and to be heard. The rules, which the Commission is authorized to adopt, prescribe that parties who enter an appearance in the investigations provided for by section 315 shall have the opportunity to examine the report of the Commissioner or investigator in charge of the investigation and also the record, with the exception of such portions of the report or record as relate to trade secrets or processes which section 708 of the act of 1916 forbids the Commission to divulge. On the 24th of October, 1922, the American Nitrogen Products Company, a Corporation, organized under the laws of the State of Washington, filed with the United States Tariff Commission, a petition and brief praying that the duty of three cents a pound imposed on sodium nitrite by the tariff act of 1922 be increased to 4½ cents per pound. On the 20th of July, 1923, notice was given by the Commission that a public hearing would be held at its office at 10 o'clock a. m., on the 10th of September, 1923, concerning the subject matter of the petition and that at that time and place the parties interested would be given an opportunity to be present, to produce evidence and to be heard as to differences in cost of production and as to all other facts and conditions pertinent to the matters which were then to be the subject of investigation.

On the 10th of September, 1923, the Norwegian Nitrogen Products Co., appeared before the Commission and made a formal request that it be given a copy of the petition which initiated the investigation and which was filed by the American Nitrogen Products Company. To that request the American Nitrogen Products Company objected on the ground that all information given to the Commission as to its capital assets and costs of production was confidential and was furnished on the promise that it would be so treated by the Commission. The Chairman announced that "the Commission has considered that when anyone submits information to it which is declared to be confidential it shall observe the confidential relation."

On the 11th of September, 1923, the Norwegian Nitrogen Products Company in writing formally requested that it be supplied by the Commission with all facts submitted to the Commission and also with a complete copy of the petition in order that the Company might be heard on the matters set forth therein. In the written request was included a brief in which it was stated that the Norwegian Nitrogen Products Company was entirely in the dark as to the real case and actual facts presented to the Commission by the American Nitrogen Products Company and that therefore the opposition to the petition was not in a position to meet the case or the facts so presented. The brief also urged that until the opposition had information as to all matters and every particle of evidence not trade

secrets submitted to the Commission, no valid finding by the Commission could be had. The Commission ruled that it had obtained its cost data under pledges of confidence and that it could not violate those pledges of its own motion. The Commission therefore declined to accede to the request of the opposition.

The Commission furnished to the appellant the application of the American Nitrogen Products Company for an increase of duty, from which application however was deleted all data as to costs of production and all matter deemed to be confidential by the Commission. Appellant was also favored with a so-called summary of information in which it was stated that the domestic price of soda ash, an important material in the manufacture of sodium nitrite, was on September 10, 1923, \$1.45 per 100 pounds in bags at makers' works; that the normal consumption of sodium nitrite in the United States was about 6,000,000 pounds per year, and that domestic producers had plant capacities equal to about 87 per cent of that requirement; that from 1 $\frac{3}{4}$  to 3 $\frac{1}{2}$  million pounds of sodium nitrite were imported annually during the period 1914 to 1921 excepting the year 1920, in which year 11,690,000 pounds came into the country from abroad; that 50 per cent of the demand for sodium nitrite in the United States was supplied by imports; that during the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound; that during the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound; that the exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; that the average invoice value was 4.84 cents per pound c. i. f. New York, from which was deducted packing, inland freight, ocean freight and insurance, leaving an average price at the factory in Norway of 4.34 cents per pound. An estimate of the cost of producing sodium nitrite in Norway was also supplied. With the exception of freight rates on soda ash and the domestic price thereof no information whatever was apparently given to the appellant as to the domestic cost of producing sodium nitrites. After receiving the summary of information the opposition again demanded 1st, a reasonable opportunity to inspect and to be heard upon all evidence which had been offered in the case, not deemed by the Commission to be trade secrets, and not, in fact, trade secrets or processes; 2nd, an inspection of all the evidence in the possession of the Commission as to the cost of power used in the United States for the production of nitrite; 3rd, information as to the evidence submitted to the Commission concerning the number of laborers employed by the American Nitrogen Products Company and the wages which they received; 4th, inspection of the evidence submitted to the Commission as to the capital invested by the American Nitrogen Products Company; 5th, an opportunity to cross-examine the experts of the Commission as to the evidence submitted by them to the Commission.

The Commission ruled that it would permit the opposition to be heard and to introduce any evidence that it might have, but that

it would not supply any information whatever in addition to that furnished by its summary of information. Inspection by the opposition of any original or primary data collected by the Commission and cross-examination of the Commission's investigators as to any of the information secured by them was also refused. The capital invested by the American Nitrogen Products Company, the value of its plant, the number of laborers employed by the Company, the wages paid and all details as to the cost of production of nitrites was held by the Commission to be confidential information, to which the opposition was not entitled.

While the investigation of the differences of costs of production of sodium nitrite in the United States and in competing countries was still pending before the U. S. Tariff Commission and before its report as to the results of the investigation had been transmitted to the President, the relator on the 12th of September, 1923, filed in the Supreme Court of the District its petition for a writ of mandamus which recited in substance the facts hereinbefore stated and prayed 1st, that a rule or order be granted directing the Tariff Commission and its members to appear and show cause why a writ of mandamus should not issue requiring them to permit the relator to examine the petition of the American Nitrogen Products Company and all data or information or evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Co. whether in the United States or out of it; 2nd, that the Tariff Commission and its members show cause why a public hearing should not be allowed at which the relator and any person or corporation appearing before the Commission, having an interest in the subject matter, should have the right and opportunity (a) to cross-examine the investigators, experts, agents and witnesses who may have supplied data, information or evidentiary matter to the Commission; (b) to offer evidence in contravention of such data, information and evidentiary matter; (c) to present arguments and representations against said petition and against the probative and legal value of any and all data, information and evidentiary matter on file with the Commission upon which the American Nitrogen Products Company based its application for an increase of duty on sodium nitrite.

The Supreme Court issued an order to show cause in accordance with the prayer of the petition and in response to the order the Tariff Commission filed its answer in which the demands made by the relator and the rulings thereon as hereinbefore set out were substantially admitted. To the answer a demurrer was filed which was overruled by the court and the relator electing to stand upon its demurrer the court on the 28th of April, 1924, ordered, adjudged and decreed that the prayer of the petition be denied and the petition dismissed. From that judgment this appeal was taken.

After the denial of the petition for mandamus and the dismissal of the petition, the Tariff Commission submitted to the President a report of its investigation of the cost of production of sodium nitrite in the United States and the production cost thereof in Nor-

way, the principal competing country. Subsequent to that report and on May 6, 1924, the President issued a proclamation in which was recited the investigation made by the Tariff Commission and the President's finding that the costs of production in the United States and Norway, the principal competing country, were not equalized by the duties imposed by Congress on sodium nitrite.

The proclamation also declared that it was necessary to increase the duty on sodium nitrite from three cents to  $4\frac{1}{2}$  cents per pound in order to equalize costs of production and accordingly advanced the duty on sodium nitrite from 3 cents to  $4\frac{1}{2}$  cents per pound.

The Tariff Commission contended in the lower court and contends here that Section 315 of the act of 1922 requiring the Commission to give reasonable public notice of its hearings and a reasonable opportunity to interested parties to be present and produce evidence and to be heard, grants to the interested parties nothing more than the right to present to the Commission such evidence as they may have and to argue their case. We cannot agree with that contention.

Under the act of 1916 the Tariff Commission was a mere investigative body charged with the duty of gathering tariff information and submitting the same whenever required to the President, the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Unquestionably under that act the Tariff Commission might hear or not hear interested parties and whether it heard or refused to hear them no harm could come to any one inasmuch as no change of duty could be accomplished without the intervention of Congress. Congress was not bound by anything that the Commission might do, say, recommend or find and was entirely free to practice investigations on its own account and to reach a conclusion as to the facts and the inferences to be drawn therefrom utterly at variance with that reported by the Commission.

Section 315 of the Tariff Act of 1922 however sought to make the dutiable list more flexible by giving to the President in certain contingencies and after investigations made by the Tariff Commission the power to change the rates of duty fixed by Congress. Under that Section the rates of duty prescribed by statute may be increased or decreased 50 per cent by the President. That is a very large grant of power if grant it be and for its exercise nothing is required except an investigation and report by the Tariff Commission.

For the correctness of his decision the President must rely on the Commission's fairness, its knowledge of the facts as they are and the verity of its findings and report. For the accuracy of its report and the wisdom of its recommendation, the Commission in its turn depends on ex parte testimony taken by it and on the unverified reports of its investigations in the field after such testimony and reports have been subjected to the test of the hearing which the statute and the Commission's rules prescribe.

For the purposes of Section 315 the Commission is no longer left free to hear whom it pleases or what it pleases. It is required by

law to give reasonable public notice of the hearing prescribed by the section and to give reasonable opportunity to parties interested to be present, to produce evidence and to be heard. That notice and the right of interested parties to be present, to produce evidence and to be heard, was not designed as the Commission contends to aid the Commission in getting the economic facts. The Commission needed no such help inasmuch as the act of 1916 as originally passed furnished to that body adequate and effective means to secure all data, evidence, facts information and apparently even trade secrets and processes pertinent to its inquiries. (See section 706 and 708 of the act of September 8, 1916 (39 Stat. 797-798.)

The right of interested parties to be present, to produce evidence and to be heard at the hearings contemplated by section 315, was granted by Congress and not by the Commission. That right was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change in rate, might be discredited, controverted or refuted.

The Commission in the exercise of the authority conferred upon it by the act of 1916, through its investigators gathered data as to capital investment, cost of power, wages paid to labor and the cost of production of nitrites in the United States and abroad. Its refusal to disclose any of that information with the exception of the price of soda ash reduced to little better than an empty form the right of the opposition to be present to produce its evidence and to be heard.

Of what value to the opposition was the right to produce evidence if the opposition knew nothing of the data collected by the Commission or of the facts or evidence submitted to the Commission for its consideration in reaching a conclusion as to the cost of production of nitrites? Just how was the opposition to meet the petition of the American Nitrogen Products Company if the former was not permitted to see the petition of the latter and was supplied with nothing better than a deleted copy from which was omitted every material allegation as to the costs of production set out in the petition actually filed with the Commission? Of what use to the opposition was the right to introduce evidence on its part and to argue the case if it had no knowledge of the data gathered by the Commission or of the information submitted by the American Nitrogen Products Company or of the issues raised by the petition and the evidence?

To hold that the right to be heard means simply the right to produce evidence and to argue the case would leave interested parties at the mercy of those who initiated the proceeding and render useless the safeguard which Congress manifestly interposed to protect importers, merchants, industrials, consumers and even the Commission itself from unreliable data, insufficient evidence and mistaken conclusions of fact.

Barring trade secrets and processes the disclosure of which is expressly forbidden, the opposition by virtue of its statutory right to be heard, was entitled to be informed of the facts and evidence

privately presented to the Commission for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, under the rules of the Commission itself, the Norwegian Nitrogen Products Company should have been given an opportunity to examine the record and the reports of the Commission or investigator in charge of the investigation.

The term "trade secrets" as ordinarily understood, means an unpatented secret commercially valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.

Costs of production of any by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

Business privacy will be protected, it is true, from mere fishing expeditions in search of evidence (Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of business privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. Bank of Columbus v. Okely, 4 Wheat. 235-244; United States v. Louis, & Nash, R. R. 236 U. S. 318.

As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States on the sole ground that such facts, data, information, evidence and reports were confidential and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute.

Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty

which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report, found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

Mandamus to the Commission requiring it to make the disclosures demanded in order that the appellant might be properly heard, would not in any way modify, affect or vacate the rate of duty fixed by the President or compel him to fix a new rate or to restore the rate prescribed by the act of 1922. Whether the investigation practiced by the Commission was properly or improperly accomplished, its jurisdiction of the subject matter ended when it made its report to the President and the President made his decision thereon. The Tariff Commission's relation to the President is substantially the same as that of a Commissioner to a trial court. If the Commissioner fails to accord a hearing according to law the trial court may remand the matter to the Commissioner for a proper hearing, but after judgment on the report has been entered errors committed by the Commissioner during the hearing can hardly be corrected by mandamus proceedings. Certainly such errors could not be corrected in that way while the judgment was in full force and effect.

The event which the appellant sought to avoid by appearing before the Tariff Commission has already happened without legal fault on the part of the respondent and mandamus to the Tariff Commission to hear the appellant as prescribed by law would afford no relief inasmuch as the writ could not affect the rate proclaimed. The sole purpose of the hearing by the Tariff Commission was to assist the President in determining whether or not he would change the statutory rate on the report of the Commission. The President has not only decided to change but has actually changed it. The Commission has now no power to reopen the matter until the President again requires the assistance of the Commission as prescribed by section 315 and there is therefore no subject matter upon which the writ could effectively operate. From that it follows that it would be useless to issue the writ and that the writ should not be granted. *People v. Clark*, 70 N. Y. 518; *Mills v. Green*, 159 U. S. 651-653, 564-567; *Brownlow v. Schwartz*, 261 U. S. 216.

If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

The judgment appealed from is affirmed with costs.

## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

JUDGMENT—April 6, 1925

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Judge James F. Smith, April 6, 1925.

Judge James F. Smith of the U. S. Court of Customs Appeals sat in this case in the place of Mr. Chief Justice Martin.

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## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed April 24, 1925

Now comes your petitioner, The Norwegian Nitrogen Products Co., Inc., appellant in the above entitled cause, by its attorney, Marion De Vries, Esq., and shows unto the court that on the 6th day of April, A. D., 1925, a decision was rendered and a judgment entered against it herein and on the 23rd day of April, A. D., 1925, said judgment under the rules of the said court became final, in which decision and judgment, to its damage and prejudice, certain errors were committed, as will fully appear from the assignment of errors herewith filed.

Your petitioner further shows that the judgment of the Court of Appeals herein is subject to review by the Supreme Court of the United States under the provisions of paragraphs first, third, fifth and sixth, of Section 250 of the Judicial Code of the United States, in the particulars and under said paragraphs specifically, as follows:

1. Paragraph first said Sec. 250. The jurisdiction of the trial court is herein in issue. The question is herein raised and presented for decision whether or not the trial court had jurisdiction of the remedy sought by petitioner there being none such provided by law unless Sec. 315, Tariff Act of 1922, is constitutional.

2. Paragraph third Sec. 250. This is a case involving the application of the Constitution of the United States, to wit, whether or not appellant was denied due process of law under the Fifth Amendment of the Constitution of the United States by being denied the right to a public "hearing" and "to be present, to produce evidence

and to be heard" as accorded interested parties appearing in proceedings by the United States Tariff Commission under Section 315, Tariff Act of 1922.

3. Paragraph third said Sec. 250. This is a case involving the construction of the Constitution of the United States, to wit, whether or not Congress in enacting Sec. 315, Tariff Act of 1922, after having fixed the duties therein laid in terms of a state of facts, exceeded its constitutional powers by delegating to the President the power to ascertain and proclaim those facts.

4. Paragraph third said Sec. 250. There is here drawn into question the constitutionality of Sec. 315, Tariff Act of 1922, a general law of the United States.

5. Paragraph fifth said Sec. 250. There is here drawn into question the validity of an authority exercised under the United States, and the existence and the scope of the power or duty of certain officers of the United States, to wit, whether or not under Sections 315 and 318 of the Tariff Act of 1922 and the Revenue Act of September 8, 1916, the United States Tariff Commission in this cause has duly exercised its powers and duties as therein prescribed, and duly afforded the interested parties appearing herein a public "hearing," and the right "to be present, to produce evidence and to be heard" as by said Sec. 315 prescribed; said laws being public, general laws of the United States.

6. Paragraph sixth said Sec. 250. The due construction of Sections 315 and 318 of the Tariff Act of 1922, and the Revenue Act of September 8, 1916, general laws of the United States, are here drawn into question by the respondent.

There is also here drawn in question by respondent the construction of a Regulation of the President of the United States, duly made October 7, 1922, under the express authority of Sec. 315 (e), Tariff Act of 1922, having by reason thereof the full force and effect of and being in effect a general law of the United States (*Campbell v. United States*, 107 U. S. 407), submitting this with other causes to the United States Tariff Commission for investigation "in accordance with law."

Section 315, Tariff Act of 1922, is not, if at all such, solely and only a "revenue law" of the United States within Sec. 250 of the Judicial Code. Congress having previously by the dutiable paragraphs of said Act, Title I Paragraphs 1 to 1710 inclusive, levied the estimated duties necessary for revenue purposes, proceeded by Sec. 315 as therein by Congress declared (Head money cases 112 U. S., 581, 394) "in order to regulate the foreign commerce of the United States," (Sec. 8. 3. Constitution of the United States) "and to put in force and effect the policy of the Congress by this Act intended." The title of the Act indicates the "policy of the Congress by this Act intended" being "to encourage the industries of the United States." (Sec. 8. 18. Constitution of the United States), *United States v. Nichols*, 186 U. S., 298-303, *Russell v. Williams*, 106 U. S. 623.

Wherefore your petitioner, appellant, prays the allowance of a writ of error to remove said cause to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court, and that the bond, to act as supersedeas, be fixed at the nominal sum of Three hundred (\$300) Dollars, no values being involved.

Norwegian Nitrogen Products Co., Inc., by Marion De Vries,  
Attorney for Appellant. De Vries, Doherty, Davis & Lamb,  
of Counsel.

Dated April 24, 1925.

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**IN COURT OF APPEALS OF DISTRICT OF COLUMBIA**

[Title omitted]

**ASSIGNMENT OF ERRORS—Filed April 24, 1925**

And now comes the Norwegian Nitrogen Products Co., Inc., the appellant herein, by its attorney, Marion De Vries, Esq., and says that in the record and proceedings of the Court of Appeals in the above entitled cause and in the rendition of the judgment therein manifest errors have intervened, to the prejudice of said appellant, in the particulars following, to wit:

1. In affirming the judgment of the Supreme Court of the District of Columbia. In affirming said judgment with costs.
2. In holding that respondent was without legal fault under the laws of the United States in reporting to the President or in attempting to transfer or in transferring the subject matter of this proceeding to the President while the cause was under the laws of the United States within the appellate jurisdiction of the District Court of Appeals of the District of Columbia and the Supreme Court of the United States. In holding that it was the legal duty or right of respondent to report to the President in this cause when respondent so reported or at any fixed time prior to exhaustion of the appellate jurisdiction of said courts.
3. In holding that a writ of mandamus in this cause directed to the United States Tariff Commission to hear appellant as prescribed by the laws of the United States would afford appellant no relief; and, in holding that so granting could not under the laws of the United States affect the rate of duties herein proclaimed by the President.
4. In holding that the United States Tariff Commission now has no power under Sec. 315, Tariff Act of 1922, and the laws of the United States, to reopen its investigation or to hear appellant in this cause without further order of the President; the President, acting under Section 315 and a regulation by him duly made, having duly

referred the matter to said Commission "for such investigation as shall be in accordance with law, \* \* \* and no such investigation "in accordance with the law" having as yet been made by the Commission.

5. In holding that there is no subject matter of this cause within the jurisdiction of the Court or the said United States Tariff Commission upon which the writ herein prayed could effectively operate.

6. In holding that it would be useless to grant the writ herein prayed and in holding that the writ herein prayed should not be granted.

7. In not, in lieu of denying appellant judgment herein, awarding the same to appellant and holding and adjudging respondent guilty of contempt or liable in the premises with appropriate order effecting and directing that it respond in damages, such as appellant's costs herein, in case respondent did or could not restore to the jurisdiction of the Court and the Supreme Court of the United States the subject matter of this proceeding, if as the Court found such was removed by respondent beyond effective judgment while the District Court of Appeals of the District of Columbia and the Supreme Court of the United States yet possessed appellate jurisdiction of said cause.

8. In assessing appellant with costs in a cause or proceeding wherein appellant was sustained upon all allegations of its petition, but denied judgment by reason of respondent's alleged avoidance of judgment whether by transferring the subject matter of the cause from the jurisdiction of the court or by making report to the President upon the subject matter thereof, while appellate authority of the said courts was not exhausted and was being duly and diligently invoked.

9. In not deciding whether or not the trial court had jurisdiction of the remedy herein sought, as affected by the constitutionality of said Sec. 315, that section being the only law of the United States upon which judgment herein was prayed and could be grounded and that question having been duly made in the cause or proceeding and decision thereof duly requested.

10. In failing to pass upon and decide the question whether or not Congress in the enactment of Section 315 of the Tariff Act of 1922, exceeded its constitutional authority by delegating to the President the power to ascertain and proclaim the duties by that section laid by the Congress, that question having been duly made and raised by the pleadings and otherwise in this proceeding and decision thereof having been duly requested.

11. In failing to hold and decide that appellant has no legal or equitable remedy whatsoever for the denial of his constitutional rights herein to a public "hearing," and, "to be present, to produce evidence and to be heard" thereat as provided by said Section 315 and herein adjudged by the Court, if said Section 315 is constitu-

tional, wherefore the Court further erred in not determining the constitutionality of said section and the thereupon dependent right of appellant herein to the writ prayed, and, if said Section 315 is constitutional the Court therefore further erred in not holding said writ should be granted.

12. In failing to hold that, (the President having by regulation duly invoked the assistance of the United States Tariff Commission in performance of his duties under said Section 315 thereby directing said Commission to make an "investigation" of the subject of this cause "in accordance with the law,") until such an investigation "in accordance with the law" shall by the Commission have been made, said Commission has and had no jurisdiction to report the increased rate of duty upon the particular subject matter to the President, has not legally exercised its functions in the premises, is yet under the legal duty imposed by the regulation of the President to make an "investigation in accordance with law," may at any time thereto proceed herein "in accordance with the law," and, having so proceeded, make legal report to the President.

13. In not reversing the judgment of the Supreme Court of the District of Columbia and directing said Court to issue a writ of mandamus directing said Commission to hold a public hearing in said cause whereat appellant would be accorded the right, upon or prior to final acceptance or adoption by the Commission as such of any and all evidence and data upon which said Commission shall base its report to the President, not shown by sufficient and competent evidence in the case to be trade secrets or processes, to be present, to present evidence as to such and to be heard thereupon in accordance with the definition of said rights of interested parties as declared by said District Court of Appeals.

Norwegian Nitrogen Products Co., Inc., by Marion De Vries,  
Attorney for Appellant. (Signed) Marion De Vries. De  
Vries, Doherty, Davis & Lamb, of Counsel.

Service acknowledged and copy received of foregoing "Petition of Appeal and Assignment of Errors" this 24th day of April, A. D. 1925.

Peyton Gordon, Attorney for Appellee.

[File endorsement omitted.]

**IN COURT OF APPEALS OF DISTRICT OF COLUMBIA**

[Title omitted]

**ORDER ALLOWING WRIT AND FIXING BOND—Friday, April 24, 1925**

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United

States, it is ordered by the Court that the writ issue as prayed. And it is further ordered that the bond to act as supersedeas be fixed at the sum of three hundred dollars.

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**IN COURT OF APPEALS OF DISTRICT OF COLUMBIA**

**WRIT OF ERROR**

**UNITED STATES OF AMERICA, ss:**

**The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:**

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between United States of America ex rel. Norwegian Nitrogen Products Co., Inc., appellant, and The United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, David J. Lewis, et al., appellees, No. 4168, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 28th day of April, in the year of our Lord one thousand nine hundred and twenty-five.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of Court of Appeals, District of Columbia.)

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**SUPERSEDEAS BOND ON WRIT OF ERROR FOR \$300.00—Approved and filed April 28, 1925; omitted in printing**

[File endorsement omitted.]

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**CITATION—In usual form, showing service on Peyton Gordon; filed April 29, 1925; omitted in printing**

[File endorsement omitted.]

## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

PRECEPTE FOR TRANSCRIPT OF RECORD—Filed April 30, 1925

The clerk will please prepare a transcript of record on writ of error to the Supreme Court of the United States in the above-entitled cause and include therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry as to argument of case.
3. The opinion.
4. The judgment.
5. Petition for allowance of writ of error and assignment of errors.
6. Order allowing writ of error.
7. Writ of error.
8. Bond.
9. Citation.
10. This designation.

Norwegian Nitrogen Products Co., Inc., Appellants, by  
Marion De Vries, Its Attorney.

Service acknowledged this 30th day of April, 1925.

(Signed) Peyton Gordon, Attorney for Appellee.

[File endorsement omitted.]

## IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

## CLERK'S CERTIFICATE

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and twpewritten pages numbered from 1 to 128, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel, in the case of United States of America ex rel. Norwegian Nitrogen Products Co., Inc., appellant, vs. The United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, David J. Lewis, et al., No. 4168, April Term, 1925, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 30th day of April, A. D. 1925.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of Court of Appeals, District of Columbia.)

Endorsed on cover: File No. 31,105. District of Columbia Court of Appeals. Term No. 405. The United States of America ex rel. Norwegian Nitrogen Products Co., Inc., plaintiff in error, vs. The United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al. Filed April 30th, 1925. File No. 31,105.

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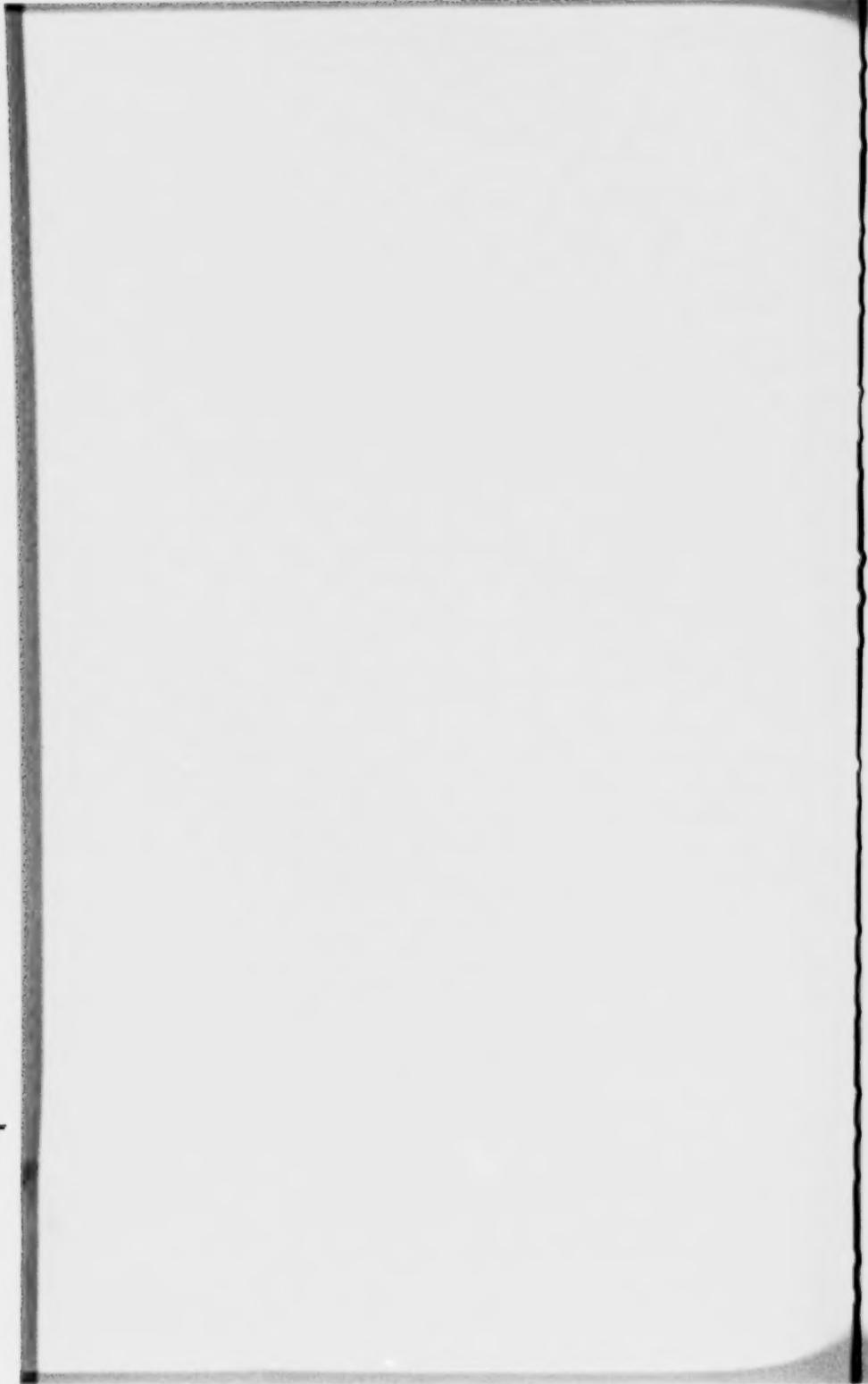
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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1926

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No. 405

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THE UNITED STATES OF AMERICA EX REL. NORWEGIAN  
NITROGEN PRODUCTS CO., INC., *Plaintiff in Error*,  
vs.

THE UNITED STATES TARIFF COMMISSION, THOMAS O.  
MARVIN, WILLIAM S. CULBERTSON, ET AL.

---

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT  
OF COLUMBIA

---

BRIEF FOR PLAINTIFF IN ERROR

---

**PART I**

**STATEMENT OF THE CASE OF PLAINTIFF IN  
ERROR**

This case comes here from the Court of Appeals,  
District of Columbia, by Writ of Error seeking a re-  
view of a decision of that court affirming a decision of

the Supreme Court of the District of Columbia rendering judgment against plaintiff in error in a mandamus proceeding against the United States Tariff Commission.

[By reason of the repeated reference herein to certain provisions of the United States Statutes, to avoid excessive repetition of the volume whenever the section is referred to, a single statement thereof is here made, as follows:

"Tariff Act of 1922" (42 Stats. 858); Secs. 315(a) to (f) same act (42 Stats. 941-943); Sec. 318(a) to (f) same act (42 Stats. 946, 947); See. 402(a) to (f) same act (42 Stats. 949); Sec. 501 same act (42 Stats. 966).

"Revenue Act of 1916," Sec. 702 (39 Stats. 796); Sec. 706 same act (39 Stats. 796); Sec. 708 same act (39 Stats. 798).]

The appeal to the District Court of Appeals was from a judgment of the Supreme Court of the District of Columbia denying the prayer of and dismissing a petition for a writ of mandamus. Answer and return having been duly filed to said petition, demurrer thereto was duly made. The demurrer having been by the court overruled the relator, plaintiff in error here, elected to stand upon its said demurrer, wherefore said judgment was entered. (Rec. Fol. 133.) The case therefore presents only questions of law. ("Assignments of Errors" Rec. Fols. 135-6-7.)

Briefly stated, the petition and prayer thereof seek to compel the United States Tariff Commission proceeding, under the provisions of the Flexible Tariff, Section 315, "Tariff Act of 1922 (which provides that the Commission shall give "public notice" of its "hearings" and that thereat "all persons interested will be given an opportunity to be present, to produce

evidence and to be heard''), in an investigation of the costs of production of nitrite, to allow appellant to inspect all or specified parts of certain designated evidence, admitted in said answer and return to be in possession of the Commission as such, relating to costs of labor, costs of power, costs of materials, and other items of cost of production of sodium nitrite in the United States and foreign countries, and to produce evidence in contradiction thereof *after* such inspection, and to cross-examine the petitioner before said Commission as to testimony and data he had testified to or submitted as to such cost items in his own plant.

The Commission by its answer and return seeks to justify the refusal to comply with all or any of said requests upon the ground that the said data and information before it relating to these cost items and all items of cost of production are "trade secrets" which it alleges it is prohibited under the provisions of Section 708 (Rec. fol. 27) of the Revenue Act of 1916, as reenacted in Section 318 of the Tariff Act of 1922, to disclose, admitting at the same time possession of such data and information.

The Court of Appeals upheld every contention of relator, plaintiff in error, an importer of nitrite and an interested party, as to the asserted rights of inspection, examination, etc., of the Commission's records (R. 93-99) but declined to reverse the judgment of the lower court upon grounds hereinafter stated.

The fact is that either after plaintiff in error had or while it was in due time perfecting appeal to the District Court of Appeals in review of said judgment of the District Supreme Court, the Tariff Commission without any express direction from the President, so requiring, and obviously to avoid final adverse

judgment by the Court of Appeals or this Court *reported findings* to the President based upon the data then and now in its possession. The Commission then on appeal came into the Court of Appeals with a plea in their brief therein, pages 19, 20 and 21, as follows:

"After the decision of Mr. Justice Siddons, holding Respondent's answer sufficient, the Tariff Commission, in conformity with its statutory duty in that behalf, submitted to the President a report of its investigation of the costs of production of sodium nitrite in the United States and in the principal competing foreign country. On May 6, 1924, the President issued his Proclamation under the statute, wherein after reciting the investigation by the Tariff Commission he declared that the duty on sodium nitrite did not equalize the differences in costs of production in the United States and in the principal competing country, namely, Norway, and that he had ascertained and determined the increased rate of duty necessary to equalize the same, and thereupon determined and proclaimed that the increase in the rate of duty provided in the Tariff Act of 1922 shown by said ascertained differences in said costs of production necessary to equalize the same, was an increase in said duty from 3 cents a pound to 4½ cents per pound.

"For the guidance of customs officers and for the information of all concerned, the President's proclamation was published by the Treasury Department under date of May 22, 1924, in Treasury Decision No. 40204.

"Thirty days after the date of said Proclamation the increased duty went into operation. From and after that date Section 315 of the Tariff Act of 1922 required that such increased duty should 'be levied, collected, and paid on such articles when imported from any foreign country into the United States.'

"Much as the respondents would welcome the decision of this Court upon questions raised by appellant that are susceptible of judicial determination, nevertheless they are constrained to point out that this case has now become moot.

"The Court will take judicial notice of the fact that the President has proclaimed a change in the rate of duty upon sodium nitrite. His proclamation was issued on the 6th day of May, 1924. Thirty days thereafter—that is to say, on the 5th day of June, 1924—the statutory requirement that the increased duty 'shall be levied, collected, and paid on such articles when imported from any foreign country into the United States' became effective. Sec. 315 (a). Whether or not the President was warranted in issuing the proclamation, it thereupon became the duty of the customs officers to collect the increased duty, and there is no relief possible under this petition that could control or modify that action. No writ that could conceivably issue against the Tariff Commission in this case could by any possibility strike down the proclamation of the President, or prevent the customs officers from assessing and collecting the amount of revenue accruing under section 315 and the proclamation issued in accordance therewith."

The Court of Appeals holding against the Commission on every other issue sustained them upon this belated effort to escape judgment and assessed costs on Plaintiff in Error, reasoning as follows:

"Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which

would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report, found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

"Mandamus to the Commission requiring it to make the disclosure demanded in order that the appellant might be properly heard, would not in any way modify, affect or vacate the rate of duty fixed by the President or compel him to fix a new rate or to restore the rate prescribed by the act of 1922. Whether the investigation practiced by the Commission was properly or improperly accomplished, its jurisdiction of the subject matter ended when it made its report to the President and the President made his decision thereon. The Tariff Commission's relation to the President is substantially the same as that of a Commissioner to a trial court. If the Commissioner fails to accord a hearing according to law the trial court may remand the matter to the Commissioner for a proper hearing, but after judgment on the report had been entered errors committed by the Commissioner during the hearing can hardly be corrected by mandamus proceedings. Certainly such errors could not be corrected in that way while the judgment was in full force and effect.

"The event which the appellant sought to avoid by appearing before the Tariff Commission has already happened without legal fault on the part of the respondent and mandamus to the Tariff Commission to hear the appellant as prescribed by law would afford no relief inasmuch as the writ could not affect the rate proclaimed. The sole purpose of the hearing by the Tariff Commission

was to assist the President in determining whether or not he would change the statutory rate on the report of the Commission. The President has not only decided to change but has actually changed it. The Commission has now no power to reopen the matter until the President again requires the assistance of the Commission as prescribed by section 315 and there is therefore no subject matter upon which the writ could effectively operate. From that it follows that it would be useless to issue the writ and that the writ should not be granted. *People v. Clark*, 70 N. Y. 518; *Mills v. Green*, 159 U. S. 651-653, 654-657; *Brownlow v. Schwartz*, 261 U. S. 216.

"If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

"The judgment appealed from is affirmed with costs."

Upon grounds of error therein had by the Court and for its failure to pass upon a constitutional question duly made in the case, error was duly assigned (R. 103-104) as follows:

"1. In affirming the judgment of the Supreme Court of the District of Columbia. In affirming said judgment with costs.

2. In holding that respondent was without legal fault under the laws of the United States in re-

porting to the President or in attempting to transfer or in transferring the subject matter of this proceeding to the President while the cause was under the laws of the United States within the appellate jurisdiction of the District Court of Appeals of the District of Columbia and the Supreme Court of the United States. In holding that it was the legal duty or right of respondent to report to the President in this cause *when* respondent so reported or at any fixed time prior to exhaustion of the appellate jurisdiction of said courts.

3. In holding that a writ of mandamus in this cause directed to the United States Tariff Commission to hear appellant as prescribed by the laws of the United States would afford appellant no relief; and, in holding that so granting could not under the laws of the United States affect the rate of duties herein proclaimed by the President.

4. In holding that the United States Tariff Commission now has no power under Sec. 315, Tariff Act of 1922, and the laws of the United States, to reopen its investigation or to hear appellant in this cause without further order of the President; the President, acting under Section 315 and a regulation by him duly made, having duly referred the matter to said Commission "for such investigation as shall be *in accordance with law*, \* \* \* and no such investigation "*in accordance with the law*" having as yet been made by the Commission.

5. In holding that there is no subject matter of this cause within the jurisdiction of the Court or the said United States Tariff Commission upon which the writ herein prayed could effectively operate.

6. In holding that it would be useless to grant the writ herein prayed and in holding that the writ herein prayed should not be granted.

7. In not, in lieu of denying appellant judgment herein awarding the same to appellant and hold-

ing and adjudging respondent guilty of contempt or liable in the premises with appropriate order effecting and directing that it respond in damages, such as appellant's costs herein, in case respondent did or could not restore to the jurisdiction of the Court and the Supreme Court of the United States the subject matter of this proceeding, if as the Court found such was removed by respondent beyond effective judgment while the District Court of Appeals of the District of Columbia and the Supreme Court of the United States yet possessed appellate jurisdiction of said cause.

8. In assessing appellant with costs in a cause or proceeding wherein appellant was sustained upon all allegations of its petition, but denied judgment by reason of respondent's alleged avoidance of judgment whether by transferring the subject matter of the cause from the jurisdiction of the court or by making report to the President upon the subject matter thereof, while appellate authority of the said courts was not exhausted and was being duly and diligently invoked.

9. In not deciding whether or not the trial court had jurisdiction of the *remedy* herein sought, as affected by the constitutionality of said Sec. 315, that section being the only law of the United States upon which judgment herein was prayed and could be grounded and that question having been duly made in the cause or proceeding and decision thereof duly requested.

10. In failing to pass upon and decide the question whether or not Congress in the enactment of Section 315 of the Tariff Act of 1922, exceeded its constitutional authority by delegating to the President the power to ascertain and proclaim the duties by that section laid by the Congress, that question having been duly made and raised by the pleadings and otherwise in this proceeding and decision thereof having been duly requested.

11. In failing to hold and decide that appellant has no legal or equitable remedy whatsoever for

the denial of his constitutional rights herein to a public "hearing," and, "to be present, to produce evidence and to be heard" thereat as provided by said Section 315 and herein adjudged by the Court, *if said Section 315 is constitutional*, wherefore the Court further erred in not determining the constitutionality of said section and the thereupon dependent right of appellant herein to the writ prayed, and, if said Section 315 is constitutional the Court therefore further erred in not holding said writ should be granted.

12. In failing to hold that, (the President having by regulation duly invoked the assistance of the United States Tariff Commission in performance of his duties under said Section 315 thereby directing said Commission to make an "investigation" of the subject of this cause "in accordance with the law,") until such an investigation "in accordance with the law" shall by the Commission have been made, said Commission has and had no jurisdiction to report the increased rate of duty upon the particular subject matter to the President, has not legally exercised its functions in the premises, is yet under the legal duty imposed by the regulation of the President to make an "investigation in accordance with law," may at any time thereto proceed herein "in accordance with the law," and, having so proceeded, make legal report to the President.

13. In not reversing the judgment of the Supreme Court of the District of Columbia and directing said Court to issue a writ of mandamus directing said Commission to hold a public hearing in said cause whereat appellant would be accorded the right, upon or prior to final acceptance or adoption by *the Commission as such* of any and all evidence and data upon which said Commission shall base its report to the President, not shown by sufficient and competent evidence in the case to be trade secrets or processes, to be present, to present evidence as to such and to be heard there-

upon in accordance with the definition of said rights of interested parties as declared by said District Court of Appeals."

### **THIS CASE IS NOT MOOT**

The Commission contends that, since the decision below, *by their own acts* the case has been so made moot. That we may not misinterpret their position on this important point we quote the exact words of their brief, *supra*, as follows:

"After the decision of Mr. Justice Siddons, holding Respondent's answer sufficient, the Tariff Commission, *in conformity with its statutory duty in that behalf*, submitted to the President *a report of its investigation* of the costs of production of sodium nitrite in the United States and in the principal competing foreign country." (Italics ours.)

What constitutes a "moot" case is concisely defined in *Ex Parte Steel*, 162 Fed. Rep., 694-702, as follows:

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."

For the purpose of this case we will adopt the doctrine of *Mills v. Green*, 159 U. S., 651-653, relied upon and quoted by the court below. Therein this Court declares a case to be "moot" when "an event occurs which renders it impossible for this Court, if it

should decide the case in favor of the plaintiff, to grant him *any* effectual relief *whatever \* \* \** (Italics ours.)

Now what relief is here sought? What is here sought is certain acts to be performed by the United States Tariff Commission and by none other. It is here sought to inspect, to offer evidence as to and to be heard upon a petition and certain cost data in possession of the said Commission, on the 8th day of December, 1923, intended to be and used for the purpose of their report to the President upon sodium nitrite, to compel said Commission to hold a public hearing for that purpose, and to thereat allow cross-examination of certain experts in its employ with reference to said data and their methods of procedure in and how they obtained the same, and Mr. C. F. Graff of Seattle with reference to said petition and the testimony given by him at a hearing of said Commission as to the omitted parts of said petition and as to his annual production, costs of power, etc., in his plant at Seattle.

The sole reason assigned as aforesaid why that cannot now be done, and their statement as to how they have rendered that now impossible, is, that *based upon said data* they have made "a report" to the President.

*Under the law, Sec. 318, Tariff Act of 1922, they may later be required to make "a report" based upon the same data to Congress.*

They nowhere allege that they have sent to the President *said data*, nor that they have lost control by cessation of employment or otherwise of their said agents or that they have not the power to subpoena them or Mr. Graff, petitioner before the Commission, to be present at any hearing ordered by this Honorable Court. On the contrary they assert in their an-

swer their plenary powers to subpoena persons for such purposes from all four corners of the Globe. In their said "report" to the President, they admit and declare all said data is now being held in custody of the Commission. Said report is entitled: "*Sodium Nitrite. Report of the United States Tariff Commission to the President of the United States.*" "Government Printing Office, 1924." Therein at page 1 it is stated:

**"REFERENCE TO FILES.—This report is based upon the following documents, which are available for reference in the files of the Tariff Commission:**

File of the original documents, including the application and Expert's Preliminary Report, dated November 17, 1922.

Expert's Confidential Report to the Commission, dated September 10, 1923.

Published Summary of Information in the Matter of Sodium Nitrite, dated September 10, 1923.

Stenographic Minutes of Hearings on September 10 and 26, and October 6, 1923.

*Briefs of Applicant*, the American Nitrogen Products Co., through Attorneys McCumber and Sullivan, on October 6, 1923, and on October 12, 1923.

Brief of the Norwegian Nitrogen Products Co., through Attorneys De Vries and Doherty.

*Advisory Board's Final Summary Report to the Commission, dated October 29, 1923.*" (Italics ours.)

Moreover, the order or rule of the President (Record, folio 25), assigning this and all such cases to the Commission for investigation, explicitly provided that it was "for such investigation as shall be in accordance

*with the law \* \* \*.*" Until an investigation in accordance with the law is had, therefore, the legal manner of conducting which and the rights of parties thereat being the issues here presented to this court, there is no legal power in the Commission to make a legal and valid report upon the subject so assigned and the matter until then, under the rule of the President, remains with the Commission, and so does until an investigation "in accordance with the law" has by it been made.

Further, assuming the position of the Commission (Folio 101 Record) that the institution of an investigation is the self-determined action of the Commission, independent of any rule or direction of the President, to be the correct legal interpretation of their powers, it is within their legal power to legally proceed to investigate costs of production of nitrite at any and all times regardless of how recently or how frequently they may have so done and regardless of any reports made thereupon to the President. In such a status it follows that regardless of their action of sending a report *or even all collected data* to the President, upon due showing of the denial of the statutory rights of interested parties, this Court would have jurisdiction to compel the Commission to proceed *de novo* to afford said rights, *the Commission having such power at any time.*

No different or independent proceeding would be necessary to enable the President to proclaim a different rate of duty shown by any new, additional or different report made by the Commission "in accordance with the law." That point is concluded by the Statute. Sec. 315 (c) (Record, folio 24), provides:

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same."

Thereunder the President may when and so often as he shall find a difference in costs of production, once found, to "no longer exist" proclaim a different rate accordingly. What else would constitute an "elastic tariff" made as a substitute for Congressional action and to meet all changes in differences in domestic and foreign costs of production be they swift as in times of war or slow as in times of peace?

Certainly appellees will not contend nor will this Honorable Court hold, that, unlike all tribunals created for ascertaining and reporting, or determining, questions of law or fact, this commission or the President has been denied by law the power of correcting subsequently ascertained mistakes, errors or impositions for fraud resulting that a tax, different from that by Congress laid under this Section, shall ever be assessed. The report to the President in this case shows radical differences in the Commission as to whether or not certain freights should be taken into consideration. Suppose the President was by the Courts or the Attorney-General advised that the Commission had erred upon this question of law, will the appellees deny that the President could not refer the matter back to the Commission and the latter make a new calculation based upon the data in hand in accordance with ruling of law stated and a valid new report thereupon be made to the President? Yet that is precisely what

would follow the granting of this petition and judicial mandate to the Commission to permit the data, not trade secrets or processes, in its possession and used in the particular case as the basis of its report, to be more completely analyzed, explained and possibly disputed as by law required.

The vice of the reasoning of the court below is that it assumes the first report to the President of any legal "force." It had no other than that it was jurisdictional to a Presidential proclamation. It, however, does not necessitate or *compel* any action upon the part of the President. He can accept or reject it. He can act upon it or not act. In this status if a second report were sent the President it would have just as much legal *force* and effect and be just as legally "effectual" to compel action upon his part as the first report, no more and no less.

The law presumes, however, that the President of the United States will do his duty. So fixed was this presumption in the minds of the Fathers, and so it is and ever has been with all courts, that it has uniformly been viewed and held that no extraordinary writ runs to the President to *compel* his official action. *State of Mississippi v. Johnson*, 4 Wall., 71 U. S., 475-500. Nor is that what is contemplated by this proceeding or within its legal scope. This proceeding is directed solely to the Tariff Commission and related solely to their acts, duties and powers as by law provided. There can be no doubt, however, that it is within the general powers of the United States Courts to direct and within the scope of this proceeding to order a mandate to the Tariff Commission not only to proceed to hear this case as by law required, *but also to accordingly report to the President*. Certainly if

not within the scope of this proceeding, upon compliance with any hearings in this proceeding by the courts directed, if necessary, by refusal of the Commission to report thereafter to the President, mandamus would lie to so compel.

Without further extending this presentation it would seem sufficient upon this point to state that the power of a superior United States Court to mandamus an inferior court of the United States to proceed to hear and "determine" an issue, which includes of course the delivery of the decision and judgment to the clerk or sheriff or both for all effectual purposes of the law, is no whit different than the power that would be exercised by this Honorable Court to direct the Tariff Commission to hear this case and make due report thereof to the President.

That being done we must assume the President would, under (c) Sec. 315, proceed to modify his earlier proclamation should such be shown erroneous. Any other assumption by this Court must be predicated upon the theory that the President would not perform a manifest duty.

Indeed, a second report to the President upon the data before it upon the subject of nitrite would have no greater or less force or effect upon the President than the first, for he is not legally *bound* to follow or adopt either such action in the one case equally with the other being constrained solely by the presumption that the President will perform his duties in accordance with the manifest purposes of the law. To deny this writ is to assume he will not so do; to grant it is to assume that he will so do. Plaintiff in error has the legal right to rely upon the conclusive presumption of law that the President of the United States will per-

form the manifest and sworn duty for which Congress has in this act Section 315 (c) *supra* expressly provided.

Assuming, however, that the Commission effected the purpose it claims, of depriving this Court of its appellate jurisdiction of the subject-matter of this controversy, that does not relieve them of responsibility and does not deprive this court of authority to herein proceed nor interrupt this proceeding. In that status the responsibility of appellees is succinctly set forth by this Court in the case of Mills vs. Green, 159 U. S., 651, and the cases therein cited. We quote herein the doctrine set forth in that case. This Court in that case at page 653, said:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies *by a judgment which can be carried into effect*, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, *and without any fault of the defendant*, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. Lord v. Veazie, 8 How. 251; California v. San Pablo & Tulare Railroad, 149 U. S. 308.

“If a defendant indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the

*building the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages.* Tucker v. Howard, 128 Mass., 361, 363, and cases cited; Attorney-General v. Great Northern Railway, 4 De G. & Sm. 75, 94; Terhune v. Midland Railroad, 9 Stew. (36 N. J. Eq.) 318, and 11 Stew. (38 N. J. Eq.) 423; Platteville v. Galena & Southern Wisconsin Railway, 43 Wisconsin, 493.” (Italics ours.)

The doctrine in such cases, therefore, as announced in this Court, is that where the subject-matter of the litigation has been removed from the jurisdiction of the court, in order that the case may under the law become moot, that removal must have been “without any fault of defendant.” In cases where it was done by the act or fault of a party to the proceeding the court still retains jurisdiction of the case and will proceed to a judgment.

That cases concededly otherwise moot will be dismissed only when the party so claiming is “without fault” in removing the subject-matter of the litigation from the jurisdiction of the court, is well settled.

Heitmuller v. Stokes, 256 U. S. 360;  
 U. S. v. Hamburg-American Line, 239, U. S.  
 466-477;  
 U. S. v. Trans-Missouri Freight Assn., 166 U.  
 S. 290-308;  
 American Book Co. v. Kansas, 193 U. S., 49.

Nor does the authority or the powers of the court in the premises there cease. On the contrary, the parties

at fault contemn all courts having appellate jurisdiction of the subject-matter of the proceeding and accordingly lay themselves liable. The doctrine is well settled beyond any controversy that it is in contempt of the court in which an action is pending *and of all courts having appellate jurisdiction of the proceeding* for a litigant to destroy, remove, or conceal the subject of the litigation, or to do any other act in respect to the subject of the litigation, which may render nugatory the decision of the court as to such subject-matter.

*In re Debs.* 158 U. S., 564, 598;  
*Wartman v. Wartman*, 29 Fed. Cases, 303, 306;  
*Richard v. Van Meter*, 20 Fed. Cas. 682, No. 11,-  
763;  
*Morse v. District Court*, 29 Montana, 230;  
*Ex parte Kellogg*, 64 California 343;  
*Cottier v. People*, 61 Ill. App. 17, 30;  
*Brooklyn School v. Kearney*, 21 How. Prae. 74;  
*In re Reese*, 47 C. C. A. 87, 90;  
*Garrigan v. United States*, 89 C. C. A. 494;  
*State v. Pittsburg*, 80 Kansas, 710, 712.

Perhaps the most recent and complete adjudication of the law upon this subject was had by this Court in the case of *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 535. In that case the Merrimack River Savings Bank filed a bill in equity in the Circuit Court of the United States for the District of Kansas, as a creditor of the Clay Center Light and Power Company of Clay Center, Kansas, and certain individuals, officials of the city. A temporary injunction was issued by the court restraining destruction or removal of the poles, wires and property of the power company. A demurrer was filed for want of jurisdiction.

tion, was sustained and the bill dismissed. An appeal was allowed to this Court. The Circuit Court continued the injunction to preserve the *status quo* of the subject of the litigation pending appeal to this Court.

Upon hearing this Court dismissed the appeal, without opinion. Thereafter and before the mandate of this Court issued or could issue under its rules, *and pending the right of petitioners to file an application for rehearing*, not then but *thereafter* filed, certain of the respondents by force and violence cut down many of the poles and destroyed much of the cable and wire of the Power Company.

Contempt proceedings therefor were moved in this Court against said respondents. The respondents moved to discharge the rule claiming, first, that if there was any contempt it was in violation of the injunction of the Circuit Court and not of this Court, and secondly, that there was in law no contempt of the Supreme Court. The Court at page 535 said:

"It does not necessarily follow that disobedience of *such an injunction*, intended only to preserve the *status quo* pending an appeal, may not be regarded as a contempt of the *appellate jurisdiction of this court*, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since *irrespective of any such injunction* actually issued the willful, removal beyond the reach of the court of the subject-matter of the litigation or its destruction *pending an appeal* from a decree praying among other things, an injunction to prevent such removal or destruction until the right shall be determined, *is, in and of itself, a contempt of the appellate jurisdiction of this court*. That such conduct may be a violation of the in-

junction below affords no reason why it is not also a *contempt of this court*. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent. See United States v. Shipp, 203 U. S. 563; Richard v. Van Meter, 3 Cranch C. C. 214; S. C. 20 Fed. Cases, 682; Wartman v. Wartman, Taney C. C. Decisions, 362; S. C. 29 Fed. Cases, 303; State *ex rel.* Morse v. District Court, 29 Montana, 230; *Ex parte* Kellogg, 64 California, 343, 344; The State v. Pittsburg, 80 Kansas, 710, 712." (Italics ours.)

It is, therefore, respectfully suggested that if the Commission's contention that the subject-matter of this litigation has been removed from the jurisdiction of this court be well taken, they are still within the authority of the court to proceed herein to determine the merits of the proceeding and to render judgment accordingly as circumstances may develop.

While it was contended by the Commission that their action in the premises was "in conformity with its statutory duty in that behalf," it is respectfully suggested that no statute can be found which by implication, construction or letter requires the United States Tariff Commission at any particular time or within any fixed period to report to the President upon any matter confided to them for investigation under the provisions of Section 315 of the Tariff Act of 1922. Nor is there any rule or order of the President so requiring.

The statute investing the Commission with this authority is Section 315 (c). (Record, folio 24.) That statute simply invests the Commission with a power

and defines their duties. In this particular it in no wise differs from Section 24 of the Judicial Code investing the United States District courts with the therein prescribed jurisdiction. There is nothing in either statute requiring the completion of the exercise of the jurisdiction of either tribunal within a fixed or any period. Indeed it is confidently asserted that many petitions filed before the Commission long before this have not as yet been or were not for years thereafter reported to the President.

In the presence of a mandamus proceeding pending in this Court or a Court of Appeals running to a United States District Court praying that it be ordered to proceed in a particular manner in the exercise of its jurisdiction upon a particular subject-matter therein pending, should the judge of that District Court oust this court of that jurisdiction by deciding the case before final determination of such mandamus proceeding in the Court of last resort, none will say he would not be guilty of contempt.

The leading case upon contempt ever since followed by the courts is *Wartman v. Wartman*, 29 Fed. Cases 303, No. 17,210, opinion by Chief Justice Taney. Therein certain fundamental principles, as follows, were laid down by the court:

"The defendant, being in contempt for disobedience to the authority of the court, was not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purged himself of the contempt.

"The question whether a contempt has or has not been committed, does not depend on the intention of the party, but on the act done."

It is the well settled doctrine that a disclaimer or denial of an intention to be in contempt of court or to violate the court's orders, does not purge the accused parties of the contempt. *Wartman v. Wartman*, 29 Fed. Cases, 303, No. 17,210; *Cartwright's Case*, 114 Massachusetts, 230; *Sturoe's Case*, 48 N. H. 428; *People v. Wilson*, 64 Illinois, 194; *Hughes v. The People*, 5 Colorado, 436, 453; *Plate Co. v. Schimmel*, 59 Michigan, 524; *Dodge v. State*, 39 N. E. Rep. (Ind.) 745; 7 Am. & Eng. Eny. of Law, 76; *State v. Simmons*, 1 Arkansas, 265; *Watson v. Citizens' Bank*, 5 S. Car. 159, 182.

Wherefore, it is respectfully submitted that the subject of this proceeding has not been removed from the jurisdiction of this Honorable Court; that if so, such does not deprive this Honorable Court of authority to proceed to compel respondents to restore the same, submitting to Plaintiff in Error data admittedly in possession of the Commission and by subpoena to compel attendance of their experts and Mr. Graff, the petitioner, at any hearing noticed in response to the Court's mandate; that in the absence of respondent's power so to do, or in the presence of their inability or failure so to accomplish, it is within the authority of this Court in due time to visit respondents with suitable damages and any contempt penalties that may be found due and meet.

**PART II****AN ISSUE AS TO THE CONSTITUTIONALITY OF  
SEC. 315 TARIFF ACT OF 1922, THE FLEX-  
IBLE TARIFF, IS PRESENTED BY THIS  
RECORD AND IS HEREIN NECESSARY OF  
DECISION.**

(a) *A constitutional issue is made by the pleadings in this case:* The constitutionality of Sec. 315 of the Tariff Act of 1922, is duly alleged in the petition. (Record Page 13, Folios 18-19.) That allegation is not specially "admitted," "traversed," "confessed," or "avoided" by Respondents' answer, and is clearly denied by Respondents' general denial (Record Page 69, Folio 105) as follows:

"Respondents say that any matter or thing in said petition contained and not hereinbefore well and sufficiently admitted, traversed, confessed and avoided or denied, is not true to the best of their knowledge and belief, and the same is hereby denied."

(b) *The question of the constitutionality of the act is NECESSARILY in this case because thereupon depends the jurisdiction of the Court as to the invoked remedy.*

In Zoline on Federal Appellate Jurisdiction and Procedure, p. 13, the doctrine is stated:

"There must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. Every act of a court beyond its jurisdiction is void. *Cornett v. Williams*, 87 U. S. (20 Wall.) 226, 22 L. Ed. 254; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Ex parte Reed*, 100

U. S. 13, 23, 25, L. Ed. 538; Standard Oil v. Missouri, 224 U. S. 270, 282; Earle v. McVeigh, 91 U. S. 503, 507, 23 L. Ed. 398; Harris v. Hardeman, 55 U. S. (14 Howard) 234, 239, 14 L. Ed. 444." (Italics ours.)

In *Portland Gold Mining Co. v. Duke*, 191 Fed. Rep. 691-696, the Circuit Court of Appeals for the first circuit thus decided:

"Did this bill become a law in the manner prescribed by the Constitution of the state? Whether it did or not is a judicial question, to be determined by the court, *and arises whenever the act is drawn in question, whether made an issue by pleading or not.* *Portland Gold Min. Co. v. Duke, supra;* *Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154;* *Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204;* *Jones v. United States, 137 U. S. 202, 214, 216, 11 Sup. Ct. 80, 34 L. Ed. 691.*

"Whenever a question arises in a court of law, either of the existence of a statute, of the time when a statute took effect, or of the precise terms of a statute, the judges, who are called upon to decide it, have a right to resort to any sources of information, which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule. *Gardner v. The Collector, 6 Wall., 499, 511, 18 L. Ed. 890;* *South Ottawa v. Perkins, supra.'*" (Italics ours.)

Regardless of the issues made by the pleadings or the will of the parties the Court of its own motion is bound to inquire into and decide if it has jurisdiction.

- Minnesota v. Hitchcock*, 185 U. S., 373-382  
*Pennsylvania R. R. Co. v. St. Louis & C. R. R.*,  
 116 U. S. 472-3.  
*Metcalf v. Watertown*, 128 U. S. 586.  
*Defiance Water Co. v. Defiance*, 191 U. S. 184-194.  
*Minnesota v. Northern Securities Co.*, 194 U. S. 48-63.  
*Collins v. Miller*, 252 U. S. 364-366.

A statute void because unconstitutional is a nullity and affords no jurisdiction to any court to decree or enforce *any remedy*.

- Ex Parte Reed*, 100 U. S. 13-23; (Brief for Appellant, p. 112).  
*Windsor v. McVeigh*, 93 U. S. 274-283, 284.

The logical distinction observed by this Court being between constitutional issues as to the *existence* of a remedy going to the jurisdiction of this Court to render judgment and such an issue merely being up for decision, the denial of a right guaranteed by the Constitution should be here noted. The former must always *necessarily* be in the case; the latter may or may not so be.

Thus in the American Sugar Refining Company's case, 211 U. S., 155, 161, this Court observed the distinction between cases wherein *the statute under consideration* vests jurisdiction in the court, and cases wherein jurisdiction is vested by the Constitution or some statute other than the one before the court for interpretation or construction, or where some right under or guarantee by the Constitution is claimed to have been in issue.

The former presents a question of jurisdiction, the

latter a question of interpretation or construction of the Constitution, Statutes or both. Thus in American Sugar Ref. Co. vs. U. S., *supra*, the Supreme Court held that the determination of whether the Secretary *acted within the Statute* did not present a constitutional question. The court, however, *did in that case* consider and decide that the Statute under which the Secretary acted *was a valid Statute* under the Constitution. That was a question going to the jurisdiction of the Court; the other was a question of Constitutional or Statutory construction. To the same effect see *Rakes vs. United States*, 212 U. S. 55-58, and cases cited *supra*.

The distinction here exists. Two constitutional questions are in this case. 1. Did Congress exceed its constitutional powers by delegating to the President its tax making duties under Article 8 of the Constitution? If so this act is void and no court has *jurisdiction* to enforce the same or any part thereof. 2. Did the Tariff Commission in denying appellant the "hearing" prescribed by Sec. 315 violate the Fifth Amendment by taking property without due process of law? *The Supreme Court has so held where a hearing was denied under the Interstate Commerce Act.* That point was not here put in issue nor has it been here raised. The former constitutional question goes to the jurisdiction of the Court. Is there a legally prescribed *remedy* prayed for? The latter does not go to the *jurisdiction* of the court. Its due assertion invokes the jurisdiction of the Court for a determination of the alleged denial of a constitutional right. The former is the question here raised by Plaintiff in Error.

The courts are vigilant of the first stated class of

cases and move of their own motion in order that they do not adjudicate and decree rights by virtue of a statute void under the Constitution of which they are charged the special conservators and of which they must take judicial notice.

The courts insist in the latter class of cases, which do not concern the jurisdiction of the courts nor the enforcement by the court of remedies not provided by law but concern the private rights of individuals that constitutional issues and rights must be duly pleaded and asserted before being adjudicated.

There is such a jurisdictional question herein involved. If this act is unconstitutional there is no jurisdiction in this court to adjudge *the remedy prayed for* in this petition: for in that case 315 (e) providing the right here sought to be enforced would be null and void and as if no such law existed.

It would be as though there were no statute so providing upon the statute books. The first inquiry of the court, therefore, must necessarily be, is the remedy prayed for in the particular proceeding a remedy provided by a law?

Necessarily every Federal statute must be read in connection with the Constitution of the United States whenever that statute is one enacted in accordance with a special grant by the Constitution of authority to Congress to enact such a law. It is, therefore, incumbent upon the courts to first inquire, is there a constitutional law prescribing the remedy or right which the particular proceeding seeks to enforce. If there is none such, the court is without jurisdiction to proceed. The question thus presented, therefore, is one of jurisdiction. Has the court jurisdiction to render the judgment sought? The principle is set forth in *Ex parte Reed*, 100 U. S. 13, page 23, as follows:

"We do not overlook the point that there *must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause.* If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void. *Cornett v. Williams*, 20 Wall, 226; *Windsor v. McVeigh*, 93 U. S. 274; 7 Watt's Actions and Defences, 181." (Italics ours.)

The uniform rule of the courts of the United States is, that whether or not jurisdiction has been suggested in the case, those courts will proceed to determine whether or not there is such before proceeding to determine the issues of the case.

Thus in *Pennsylvania Railroad Company v. St. Louis, Alton and Terre Haute Railroad Company*, 116 U. S. 472, 473, it is stated:

"A plea to the jurisdiction of the court was interposed by the defendant, the Indianapolis and St. Louis Railroad Company, on the ground that the complainant was in fact a corporation of Indiana, and, therefore, not a citizen of a different State from all the defendants. This plea was overruled by the Circuit Court. *No error has been assigned on this ruling, and it was not referred to in the judgment here.* We do not, however, feel at liberty to pass it by unnoticed. Counsel may, if they desire to do so, file printed arguments on that question, together with copies of the statutes the consideration of which is involved, at any time before February 20." (Italics ours.)

The foregoing case was finally decided by the court as reported in the above entitlement, 118 U. S. 290. Therein the court held at 295 and 297:

"1. The first question arising on the record is that of the jurisdiction of the Circuit Court of the Indiana district as founded on the citizenship of the parties.

"This question was raised at an early stage of the controversy by a distinct plea to the jurisdiction, and was overruled by the Court. Afterwards, and before the decree, the defendant corporations who had filed this plea withdrew it, and desired to have the case decided on the merits.

\* \* \* \* \*

"Without going into the question whether the plaintiff in this case, if it were clearly a corporation of both States, could maintain this suit in the Circuit Court under the decisions in this court, we are satisfied that, with reference to its right to sue as a citizen of Illinois, it is *not*, also, a corporation and citizen of Indiana under the facts found in this record."

Jurisdiction was thus determined in the Court below and this Court, as by the Constitution provided, and the Court then proceeded to judgment.

An apt and precise case wherein the Supreme Court of the United States laid down the doctrine that "it is the duty of every court *of its own motion* to inquire into the matter of jurisdiction irrespective of the wishes of the parties and be careful that it exercises no powers save those conferred by the law, is found in *Minnesota v. Hitchcock*, 185 U. S., page 373, at page 382, as follows:

"A preliminary question is *one of jurisdiction*. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. *It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law.* Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which *it does not by law possess over the subject matter*. The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original and not of the appellate jurisdiction. The pertinent constitutional provisions are found in section 2 of Article III." (Italics ours.)

The Supreme Court in that case discussed *in extenso* the question of its jurisdiction, held that it had such, and proceeded to the merits of the case.

The important question involved in this branch of the case is whether or not jurisdiction can be given by stipulation of parties. If it is the *right* of the court to determine jurisdiction where not raised by the parties, it is the *duty* of the court so to do and the latter is so declared in *Minnesota v. Hitchcock*, supra. It is respectfully submitted that the courts of the United States are by the Constitution made the especial guardians thereof. This is a government by law, the highest law of the land being the Constitution of the United States. It forms an integral part of every legal concept of which a United States statute is a

part. In other words, every right accorded by a United States statute which is within the express grant to Congress by the Constitution, must necessarily be read in connection with the Constitution authorizing the Congress, or limiting the Congress, in respect of that particular class of enactments.

The words of Chief Justice Marshall in *Marbury v. Madison*, 1, Cranch, at page 178, are conclusive upon the subject of the judicial cognizance of the Constitution and its enforcement by the courts of the United States. Therein it is stated:

“The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say, that in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In *some* cases, then, the Constitution *must* be looked into by the judges. And if they can open it *at all*, what part of it are they forbidden to read or to obey?

“There are many other parts of the Constitution which serve to illustrate this subject. It is declared, that ‘no tax or duty shall be laid on articles exported from any state.’ Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? *Ought the judges to close their eyes on the Constitution, and only see the law?*

“The Constitution declares ‘that no bill of attainder or ex post facto law shall be passed.’ If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the Constitution endeavors to preserve?

" 'No person,' says the Constitution, 'shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.' Here, the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a *rule for the government of courts, as well as of the legislature.* Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and knowing the instruments, for violating what they swear to support?

"The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution *forms no rule for his government?* If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be *made in pursuance of the Constitution*, have that rank.

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." (Italics ours.)

That the Federal Courts take judicial notice of the Constitution of the United States, are the especial guardians thereof, and apply the same whether or not pleaded, see *The Bridge Proprietors v. The Hoboken Co.*, 68 U. S. (1 Wallace), page 116, at page 142, wherein the court said:

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. *If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States.* And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the

provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.' " (Italics ours.)

So, is it not equally true that the courts, especially charged with judicial notice and enforcement of the Constitution, bearing in mind that the Constitution, Art. I, Sec. 8 (1) provided: "Congress shall have power to lay and collect duties," would immediately inquire and determine whether or not this seeming delegation of that constitutional duty and power to the President was in accordance with the limited number of cases so authorized?

Take for example Chief Justice Marshall's illustration wherein he asks, would the court render judgment enforcing a statute levying an export tax upon cotton without applying the Constitution? We ask, will the court adjudicate a statute providing for an import "duty" laid by the *President*, in the face of the Constitution which says "*Congress* shall lay duties without notice of the Constitution?" Wherein is there a greater duty in the one case than in the other for the courts of their own motion and before proceeding to the merits of the case to investigate and decide the constitutional right of Congress to pass such a law? If the court is duty bound to look into and apply the Constitution in the one case why not in the other? Are the courts of the United States so impotent of power, so restrained by practice or so unheedful of the public interests and revenues, that they will proceed with all solemnity to adjudicate rights under a statute the constitutionality and consequent validity of which, though called to their attention, may subsequently show such adjudication and all gone before idle?

Whether or not this delegation by Congress of the powers thereby conferred upon the President is constitutional was a serious question in the Senate, of which this court will take judicial notice, and the debates thereupon are hereby referred to in lieu of extending this brief. They will be found in the speech by Senator Walsh of Montana against, and Senator McCumber of North Dakota for the constitutionality of the act. Cong. Record May 8, 1922 (pages 7089 to 7106, inclusive, and August 10, 1922, pages 12188 to 12213, inclusive, respectively).

An added word may well be made that the changes in the language of that act after said debates brought the act in more exact conformity with the like powers vested in appraising officers for more than a century by defining the thing to be ascertained, the "cost of production" in the principal country of exportation, as for a century the appraisers have been authorized, by Congress, to find the identical thing, cost of production in the country of exportation, in finding the basis of our tariff duties thereby finding a fact which in part measures the duty levied by Congress.

(e) Decision was duly requested as to the constitutionality of the act, in the trial court and the Court of Appeals, and due assignment of error for the failure to so decide made.

Not only was issue made by the pleadings as to the constitutionality of the act (R. pp. 13-69) but request for decision thereunder made of the trial court and due assignment of error in not so deciding made. (R. folio 137, assignment of error 15.) Likewise, similar request was made of the Court of Appeals (Brief of Appellant therein, p. 110) and due assignments of error made for the failure of that Court to decide the same (R. 104, assignment of error, 9, 10, 11, 12).

There is hereby addressed to this Honorable Court, as there was addressed to the Courts below, the following request:

In accordance with *Cornell v. Green*, 163 U. S. 78, and *Baker v. U. S.*, 212 U. S. 58, request is hereby made of this Honorable Court, that a ruling be had in this proceeding construing Sections 315 and 318 of the Tariff Act of 1922, and the Constitution of the United States, in relation thereto as to whether or not said act is constitutional.

Is the Supreme Law of the land invokable as every other law in every case? That the citizen may have it applied he must present the question to lower court; so doing he is entitled to decision upon that point.

In *Cornell vs. Green*, 163 U. S. 75-78, the Supreme Court said:

"No question of the jurisdiction of the Circuit Court has been certified to this Court; and the appellate jurisdiction of this Court is sought to be maintained upon the single ground that the case "involves the construction or application of the Constitution of the United States," within the meaning of the Judiciary Act of March 3, 1891, c. 517, par 5. 26 Stat. 828.

"But in order to bring a case within this clause of the Act, the Circuit Court must have construed the Constitution, or applied it to the case, *or must at least, have been requested and have declined or omitted to construe or apply it.* No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed *or asked for.*"

*Rakes v. United States*, 212 U. S. 58; *Muse v. Arlington Hotel Co.*, 168 U. S., 430, 437; *Loeb v. Columbia T. Trustees*, 179 U. S., 472, 480-481;

*Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S., 290, 295; *Itow and Fushimi v. United States*, 233 U. S., 582-584." (Italics ours.)

If the act is constitutional, this Court has jurisdiction of the remedy sought; if not, it has not. The issue is one that goes to the jurisdiction of the Court to render *any* judgment in the case.

#### **SEC. 315, TARIFF ACT OF 1922, IS CONSTITUTIONAL**

While elaborate arguments might be presented in support of the constitutionality of this provision, Section 315, Tariff Act of 1922, the Flexible Tariff, counsel desires only to call attention of the Court to the fact that while the Constitution of the United States, Subdivision 1 of Section 8 of Article I, empowers Congress to lay and collect taxes, duties and imposts, there is no requirement of the Constitution that the measure or "yard stick" of measurement employed by Congress in fixing a tax or duty shall be in *figures*. Congress may employ such language as to it seems fit for that purpose. It may admeasure those duties by a "state of facts," to be ascertained by prescribed person or persons, or a state of figures, or by any other "yard steik" of measurement or expression, so long as the same is definite and ascertainable. The Flexible Tariff complies with this requirement. Therein *Congress itself* fixes the duty in an expressed "state of facts," to wit, the difference between the "costs of production" in certain named countries. Congress itself has laid or fixed the duty by that language and delegated the ascertainment of the prescribed facts constituting the duty to the President aided by the Tariff Commission.

This is not a new employment by Congress for the specific purpose. The first tariff act of Congress in 1789 prescribed ad valorem duties upon American market values, said values to be ascertained by appraising officers thereby fixing the rate of duties by fixed figures to be applied to a prescribed state of facts, said state of facts to be ascertained by certain designated officials, to wit, the customs officials of the United States. That principle has ever since been a part of our customs laws.

The fact that Congress has employed a state of facts, American or foreign market value, as well as and in conjunction with a state of figures in the laying of its import duties from the foundation of the Government to the present time, if there were no other reasons, supports the constitutionality of this act beyond question. *United States v. Chemical Foundation, Inc.*, (Decided by this Court October 11, 1926); *Field v. Clark*, 143 U. S., 649; *Buttfield v. Stranahan*, 192 U. S. 470, 496; *Union Bridge Co. v. U. S.*, 204 U. S., 364, 385, 386; *Monongahela Bridge Co. v. U. S.*, 216 U. S., 177-192; *United States v. Grimaud*, 220 U. S., 506-521.

The sole discretion allowed by the act relates to the authorized means of equalizing the previously ascertained difference in costs of production. This is permissible. *Mutual Film Co. v. Ohio Industrial Commission*, 236 U. S., 230, 246; *Willoughby on Constitution*, Vol. 2, Chap. 775, page 1318.

Moreover, since the express purpose of the Flexible Tariff recited therein by the Congress is "to regulate the foreign commerce of the United States" which power of Congress is rested in Subdivision 3 of Section 8 of Article I of the Constitution, and the instant foreign commerce consists in the importation of for-

eign goods it follows, that to so regulate the same with precision and effect it is absolutely necessary that the measure of duties prescribed should be adjusted to the flexible conditions of trade between the countries, such as respective costs of production in the different countries. Wherefore it is apparent that such a yard stick of measurement of differences is absolutely essential to the execution of the powers of Congress authorized by these provisions of the Constitution.

In this particular it is not to be overlooked that while Congress is empowered "to lay and collect taxes and duties" by Subdivision 1 and "to regulate commerce with foreign nations" by Subdivision 3 of Section 8 of Article I of the Constitution aforesaid, by Subdivision 18 thereof it is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, \* \* \*,," of which the foregoing are enumerations.

The uniform course of decision of this Court has been that the determination by Congress that a particular law is necessary for a particular purpose within said constitutional warrant, is final and conclusive upon the courts. McCullough v. Maryland, 4 Wheaton 316-421, 422; Osborn v. Bank, 9 Wheaton 738; First National Bank v. Union Trust Co., 244 U. S., 416-419.

The Act, therefore, is constitutional.

### PART III

#### HISTORY OF THE CASE.

While the preceding pages conclude the presentation of the case herein of the Plaintiff in Error, this Writ of Error, brings up for consideration all the is-

sues presented and decided below. That timely brief may be filed, therefore, upon those decided in favor of Plaintiff in Error, the same will be here presented.

By the act of Congress approved September 21, 1922, therein denominated the "Tariff Act of 1922," duties were laid upon imported merchandise in the following manner: "Title I" consists of the "Dutiable List." Therein are prescribed the *rates* of duty as *part* of the levy of said duties. By "Title IV" thereof, entitled "Administrative Provisions," there is prescribed the *basis* of said duties. Said *basis* of duties is prescribed in Section 402 of Title IV of this act as the foreign value or the export value, whichever is the higher and, in the absence of either, the *cost of production* in the country of exportation, on the day of exportation, to be ascertained as in said Title IV prescribed, to wit, by the appraising officers of the United States. The Act further prescribes that an appeal may be had from the local appraiser at the port to a single general appraiser, and from the single general appraiser to a board of three general appraisers, the decision of whom shall be "final and conclusive upon all parties" unless an appeal *on questions of law only*, in a prescribed time, shall be taken to the United States Court of Customs Appeals. This last provision as to appeal to the Court of Customs Appeals is new and was for the first time allowed by the Tariff Act of 1922.

By Section 315 (a) of "Title III" of said act of Congress (Rec. fol. 23) it is provided, that "whenever the President of the United States" shall find that a rate of duty provided in "Title I" of said act does not equalize the difference between the *cost of production* of the particular merchandise covered thereby in

the foreign country of principal production, and of the like article in the United States, the President shall so find, and proclaim the equivalent rate in lieu of that established by the said "Dutiable List." By sub-section (e) of said Section 315 (Rec. fol. 24) it is provided, that investigations to "assist" the President in ascertaining said differences in cost of production shall be made by the United States Tariff Commission and "no proclamation shall be issued under this section until such investigation shall have been made." The Commission shall give reasonable public notice of "its hearings" and "shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

By subdivision (e) of Section 315 (Rec. fol. 24) it is provided:

"The president is authorized to make all needful rules and regulations for carrying out the provisions of this section."

The President has promulgated but one rule under said power or under any power controlling or relating to the proceedings of the United States Tariff provisions, to wit (Rec. fol. 25), that promulgated on October 7, 1922, reading:

**"Executive Order:**

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such

investigation *as shall be in accordance with law* and the public interest, under rules and regulations to be prescribed by such Commission." (Italics ours.)

WARREN G. HARDING.

The White House,  
October 7, 1922."

Thereafter and on the 24th day of October, 1924, the American Nitrogen Products Company of Seattle, Washington, by C. F. Graff, its President and General Manager, filed with the United States Tariff Commission its petition praying that an increase of the duty imposed in the Dutiable List of said Tariff Act of 1922, 42 Stats. 868 (par. 83), of three cents per pound upon "nitrite" be increased to 4½ cents per pound.

Thereafter and on the 20th day of July, 1923, the United States Tariff Commission, appellee, in accordance with its rules, published a public notice of a hearing September 10, 1923, upon the cost of production of nitrite declared therein to be "for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922," and stating that all parties interested would be given an opportunity "*to be present, to produce evidence, and to be heard*" at the public hearing and investigation to be held at the office of the Commission in Washington, D. C.

On the 10th day of September, 1923, the appellant, a New York corporation, an importer of nitrite into the United States, appeared as an interested party in said proceeding.

This proceeding grows out of the alleged denial of the legal rights of the appellant at said hearing, which was by said notice fixed at 10 o'clock a. m. on the 10th

day of September, 1923, and at the adjourned meetings thereof, afforded by said statute, providing that interested parties shall "be given a reasonable opportunity to be present, to produce evidence, and to be heard" in such proceedings.

By the petition for the writ of mandamus prayer is made that a rule issue out of the Trial Court below directing the said United States Tariff Commission to permit the appellant "to examine the petition of the American Nitrogen Products Company and *all* data, information, and evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said company, or elsewhere in the United States, and in foreign countries, and to show cause, if any they have, why a public hearing should not be granted, at which appellant or any other person, firm, or corporation having an interest in the subject matter appearing therein shall have the right and opportunity (1) to cross-examine investigators, experts, agents, and witnesses who may have supplied *any* such data, information or evidentiary matter. (2) to offer evidence in contravention of *any* of such data, information and evidentiary matter. (3) To be heard thereupon, that is to say, as to *any* such data, information or evidentiary matter, and to present arguments and representations against such petition, the allegations therein contained, and *any* conclusions which may be made therefrom and against the probative and legal value of *any* and *all* data, information, and evidentiary matter relating to the subject of said hearings on file with the Commission, etc." Obviously the prayer of the petition runs to the said petition filed with the Commission, and every particle of said data and informa-

tion and to the whole thereof, and accordingly, is sufficiently definite to reach *any part* thereof.

The return to said writ being duly filed by the Commission, demurrer thereto by the Plaintiff in Error was duly had. Said demurrer is upon the ground that, "by the respondents" (the Commission) "own showing by said answer against this relator," appellant, "to wit, that the said petition for a writ of mandamus be dismissed."

The issues made, therefore, were upon the sufficiency of the answer in the law to constitute a defense, and, *the hearing was upon the said answer and the demurrer thereto.* The answer is full and complete, setting out in detail the evidentiary matters in the possession of the Commission and alleging, specifically, as to each part of the petition and particle of the evidence, that by reason of Section 708 (Rec. fol. 27), the Commission is not required to permit interested parties to appear in these proceedings to examine the whole or any part thereof specifically mentioned by kind and class. If there were any lack of definiteness in the prayer of the petition for the writ of mandamus, which is not conceded, but the contrary asserted, this answer certainly, specifically, cures the same. It obviously is intended to, and does in and of itself, raise specific issues of law as to the right of the Commission to prevent interested parties to inspect or be heard upon each and every class and kind and all of the data in its possession, individually and collectively.

So alleging, the said demurrer directly puts in issue the right and duty of the Commission to permit an examination of and interested parties to be heard upon each and every class of data in its possession, including the petition itself, individually and collectively.

In these considerations it is highly important from the view of the appellant to bear in mind the distinction between the *petition* and all *data*, information and other evidentiary matter which had been presented to and considered by the *Commission* itself, as distinguished from a petition and any evidentiary matter which has been gathered by *agents* of the Commission, whether such agents be members of the Commission or appointees of the Commission or parties authorized to take depositions by the Commission and not as yet introduced in evidence before the Commission as such. The statute, Section 315 (e) (Rec. fol. 16) draws a distinction between "its hearings," to wit, the hearings of the Commission in aid of the President under Section 315, and information gathered by the agents of the Commission provided for by Section 706 (Rec. fol. 17) of the Revenue Act of 1916. Evidence gathered by agents of the Commission, however appointed, does not become a part of "its hearings" until the commission duly assembled for that purpose, admits this evidence into the record for the purpose of the determination of a particular case. Bearing this important distinction in mind we now consider the particular allegations of the answer. They are as well admissions.

Section 7 (Rec. fol. 77) of the answer recites:

"Respondents admit that thereafter, having *duly considered* and *inquired* into the *subject matter mentioned in said application*, the United States Tariff Commission, on the 27th day of March, 1923, passed an order whereby it instituted an investigation of the differences in foreign and domestic costs of production of sodium nitrate." (Italics ours.)

Here is a plain admission that this petition was taken up by the "United States Tariff Commission" and was "duly considered by said Commission" under the rule of the President promulgated aforesaid, providing all petitions filed shall be filed with said Tariff Commission "for consideration," and "the petition therefore, in its entirety, became a matter of record and consideration of the Tariff Commission in "its hearings" (private) of this matter by the Commission.

It is respectfully submitted, that if the Tariff Commission did not order said "hearings" in response to said petition, they have no jurisdiction to proceed under Section 315 to "assist the President of the United States" because the sole and only rule promulgated by the President authorizing procedure under that section by the Tariff Commission is the one quoted above, authorizing and directing them to proceed upon and only upon the petitions filed.

The learned trial judge as well as the Commission seeks to justify their position by the claim that the Commission herein is proceeding under the Revenue Act of 1916.

The Commission, however, *alleges* (Answer, Paragraph 10) (Record folio 80) in its return that it is proceeding under Section 315 in one of the cases in which the President has by rule required the Commission to proceed. They are, therefore, proceeding under Section 315 and Section 318 of the Tariff Act of 1922 and not under the Revenue Act of 1916, a separate, distinct and complete act. When proceeding under Sections 315 and 318 of the Tariff Act of 1922, in one of "its hearings," the two pertinent parts of the act, Section 315 (c) and Section 318, *re-enacting by reference* Section 708 of the Revenue Act of 1916, are both parts of

the same act and controlling of the procedure of the Commission. So, while it is claimed the Commission herein is proceeding under the Revenue Act of 1916, in its answer and return it alleges it is proceeding under an entirely different act, the Tariff Act of 1922.

The suggestion is ventured, however, that this contention is more deep-rooted than this record discloses.

A close reading of the answer or return of the Commission in this case discloses that this attitude, if adopted and approved by the courts, would, in legal effect and result, make the United States Tariff Commission in its proceedings under Section 315 independent of the Executive. The logical and legal corollary would be that, whereas Section 315 requires proceedings thereunder to be initiated "*whenever the President shall find,*" such could be inaugurated "*whenever the United States Tariff Commission shall find.*" It is respectfully submitted in this particular that proceedings under Section 315 of the Tariff Act of 1922 must be initiated by the Executive and not by the United States Tariff Commission: that the United States Tariff Commission has no jurisdiction to proceed thereunder save by rule or order duly promulgated by the President; and that in proceeding under Section 315 the United States Tariff Commission does not and cannot proceed under the Act of 1916, but under Sections 315 and 318 of the Act of 1922, subject to all of the provisions of those Sections of that act.

Then follows paragraph 10 (Rec. fol. 80) of the answer. It reads:

"10. Respondents admit that the application (called petition and brief) of said American Nitrogen Products Company was, at the times mentioned, and is now, *in the custody of the United*

*States Tariff Commission.* But respondents deny that said application is a public record. On the contrary, they aver that said petition or application is in the nature of a suggestion only, drawing the attention of the Commission as in other cases to a supposed condition of non-equalization between the existing customs duty and the difference between foreign and domestic costs of production with a view to Presidential action under the provisions of Section 315 of the Tariff Act of 1922; that the allegations in said application, as in other similar applications, were made under the protection and sanction of Section 708 of the Revenue Act of 1916, as will hereinafter be more fully shown; and are in respect of *all statements concerning methods and cost of production, including material costs, costs of power, labor costs and other items of cost*, of the person, firm or corporation filing the application, essentially confidential and privileged, and entitled to the protection of said Section 708." (Italics ours.)

By said paragraph 10 obviously the Commission admits it has in its possession as such, and receiving consideration in its proceedings, the petition of Mr. Graff. It further admits that said petition contains statements concerning the "cost of production" including specifically "material cost," "costs of power," "labor cost," and other items of cost of said corporation which are alleged to be privileged and entitled to the provisions of Section 708 (Rec. fol. 27) as a matter of law. Here is a definite, specific issue of law made by the admission of the Commission that it has in its possession the petition containing the several specific items stated, and that they have no right to exhibit them or any of them, by reason of said Section 708 (Rec. fol. 27).

To this statement and allegation Plaintiff in Error demurs, wherefore a concise and distinct issue of law is raised as to cost of production generally, and each and every of the enumerated items, separately, whether or not such are "trade secrets and processes" within said Section 708 (Rec. fol. 27).

By paragraph 15 (Rec. fol. 91) of the answer in the latter part of subdivision (a) thereof, the ~~petitioner~~ <sup>answer</sup> alleges and admits as follows:

"The witness Graff stated that he was willing to give and did give the cost of investment of the American Nitrogen Products Company's plant at La Grande as included in their figures or costs of production, and the labor employed there, and did state approximately the investment in said plant and the depreciation thereon, but *declined* to go into the *cost of labor*, the *cost of power*, and the *cost of material*, all of which witness claimed to be *competitive information* theretofore furnished the Commission, but information which they did not care to disclose in open hearing to their competitors. *And this Commission declined to direct said witness to disclose said information in open session.*" (Italics ours.)

There can be no question that, with Mr. Graff upon the stand being cross-examined in the public hearing of the Commission, the matters there adduced were a part of "its hearings." In this respect the answer aforesaid admits specifically, item by item, that as to *cost of labor*, *cost of power*, *cost of materials* the Plaintiff in Error was specifically denied the right to require Mr. Graff to answer, the court will note, not because it was protected under Section 708, but because it was "competitive information." There can be no

denial that the right to cross-examine a witness as to testimony just adduced by him, upon the subject matter testified to by him in his direct examination was a right "to be heard" before the Commission during "its hearings." The answer specifically so admits: "And this Commission declined to direct said witness to disclose said information in open session." That is to say, in "its hearings" the Commission denied this right to the appellant. This allegation of the legal right of the Commission to deny appellant the right to be heard upon, specifically, the cost of labor, the cost of power, or the cost of material, in the manner aforesaid, this demurrer challenges as not the legal right of the Commission asserted in its answer. Herein by the answer and demurrer is distinctly and specifically raised the issue of law, whether or not specifically and separately appellant was entitled to examine said witness as to cost of labor, or the cost of power, or the cost of material in his plant and of the Commission to deny the said right as "competitive information."

By paragraph 13 (Rec. fol. 86) of the answer the Commsision specifically admits that it sent experts to the three factories of nitrite in the United States, as follows:

"Said special experts accordingly obtained from each of the said companies, *upon cost schedules framed in accordance with accepted accounting practice*, the data on their books respecting the *actual costs of production* of the quantities of the sodium nitrate produced therein, that is to say, *the quantity and cost of the several materials used in the manufacture of sodium nitrate by the particular process employed in each factory, as well as the total costs of such materials; the cost*

of *direct labor*, skilled, semi-skilled, and unskilled, in the conversion of such materials into the finished product, including *such labor cost in respect of each successive stage* in such conversion; \* \* \* *selling expense*, whether in the form of *commissions* paid to agents and distributors, or by direct disbursements; *total production capacity* of the plant; the amount of the gross sales of all products manufactured by each of said companies, including sodium nitrate, and the amount of the total gross sales of sodium nitrate; the average number of wage-earners employed, the average wage rates for each class of labor employed.

"(b) The production-cost *data described* in the preceding sub-paragraph (a) and required by the Commission under the authority of Section 708, Title VII, Revenue Act of September 8, 1916, supplemented by the Tariff Act of 1922, were furnished by each of the three companies aforesaid and access to and the right to copy all and any documents, papers or records of said companies pertinent to the subject-matter of said investigation, was accorded as required by said Section 708 of said Title VII, upon the conditions and under the sanctions established by Section 708 of said Title making it unlawful to divulge to any person in any manner not provided by law, the trade secrets or processes of any person, firm, co-partnership or association embraced in such examination or investigation." (Italics ours.)

Again in paragraph 12 subdivision (g) (Rec. fol. 85) of the answer it is alleged as follows:

"That the *several items* of individual costs necessary to be taken from the books of each producer and analyzed and collated as in subsection (c) set out, are in their nature trade secrets of the several persons, firms, co-partnerships, cor-

porations or associations embraced in said examination and investigations; that the disclosure of *said items* by the Tariff Commission would constitute a direct injury and legal wrong to every such person, firm, co-partnership, corporation or association, inasmuch as it would disclose to risk its or their several competitors the precise elements, trade secrets and processes which constitute its particular advantage or disadvantage in competition, and would thereby permit unlawful and irreparable injury to private property of great value." (Italics ours.)

All of these specific admissions by the Commission that they have in their possession as a part of its hearings in this proceeding separately these specific kinds and classes of evidence, as set forth in paragraph 13 (Rec. fol. 86) and the claim that they are not entitled to show any of these several items of individual cost, are allegations of the legal powers and rights of the Commission, which are directly challenged by this demurrer as insufficient in the law or as an insufficient legal excuse, admitting all the facts, for the refusal to show the same and allow appellant to be heard thereupon, in such a proceeding.

By paragraph 13 (e) (Rec. fol. 88) the Commission alleges and admits that the information and data obtained in Norway was not from any particular manufacturing concern, but as follows:

"Said special experts, however, did ~~not~~ obtain from other *sources of a public nature*, information relating to power costs in the production of sodium nitrate, prices of soda ash, wage rates, and other factors entering into the production costs, from which information, combined with published reports and other information respecting the opera-

tions of said Norwegian company, *an estimate for use* in its summary of information hereinafter referred to was made of the cost of production of sodium nitrate in Norway." (Italics ours.)

By paragraph 15 (Rec. fol. 91) the Commission alleges, from public data collected from *public sources* in Norway, that the same indicate "an average invoice of 4.84 cents per pound c. i. f. New York." It further states certain deductions made to reach this conclusion.

By paragraph 17 (Rec. fol. 93) of the answer it will be noted that the fifth request made of the Commission related to this data upon which that calculation was made. The Commission's rulings were as follows:

"In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and *in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied.*" (Italics ours.)

Now, certainly, there can be no justification of *this* ruling upon the ground that the Commission is inhibited by Section 708 from permitting an inspection thereof. And undoubtedly the right of interested parties to examine agents of the Commission, or if not the agents of this Commission, the data itself gathered by them from *public sources* to ascertain whether or not the calculation was arrived at properly and whether or not any items were illegally included in

that calculation and whether or not the same was taken under the sanctity of oath, and the credibility of the sources thereof, is a right that cannot be denied interested parties under Section 708, or any other law or rule. Here was a specific request to inspect several classes of data admittedly in the possession of the Commission gathered from public sources upon which a calculation was made and submitted as to foreign cost of production and which is not protected by any rule of law or reason, but inspection of which was denied appellant.

The answer of the Commission, paragraph 17 (e) (Rec. fol. 96) sets out specifically the requests made of the Commission and the ruling of the Commission thereupon and each thereof as to the *specific items relating to labor, invested capital, cost of materials, cost of power*, and data collected from *public sources* in the possession of the Commission, and alleges as a legal proposition that the Commission is not bound to disclose or permit inspection of any one or all of these items. First, because it is not privileged to so do under Section 708 (Rec. fol. 96), and secondly, upon the grounds set forth in paragraph 23 (Rec. fol. 103) that the proceedings of the Commission being judicial or quasi-judicial, their opinion and ruling as to any or all of these items is conclusive and cannot be reviewed in any proceeding by any court, however erroneous their rulings may be upon the question of law involved as to whether or not the specific items are trade secrets or processes. To that allegation appellant demurs and thereby specifically raises a question of law as to each item of evidence demanded and as to each decision of the Commission in relation thereto and as to the general allegations of the legal powers of the

Commission and the conclusiveness thereof set forth in said answer. What evidence can the interested parties be "heard" upon if they are not permitted to see *any* of the cost items gathered?

### **WHAT ISSUES ARE PRESENTED IN THIS PROCEEDING**

The issues presented in any legal proceeding are of course determined by the proceedings as presented by the record. It does not follow, however, that all parts of the record in every determination are to be taken into consideration. In this proceeding stress has been laid by the Trial Court and the Commission upon the prayer of the petitioner, seeking *thereby* to greatly limit the due demands of Plaintiff in Error to an alleged narrow demand thereby made. The Trial Court in rendering its opinion, lays much stress upon the sufficiency of the prayer to the petition. It is the contention of the Plaintiff in Error that the prayer of the petition was not before the Court for construction.

The Commission in the brief before the Court of Appeals at page 27 states:

"At this point, we are constrained to express our astonishment at appellant's proposition that the 'prayer of the petition was not before the court for construction.' The prayer of the petition not only was, but of necessity had to be, before the court below. \* \* \* Appellant, moreover, seems completely to have overlooked the elementary and familiar rule that a demurrer opens up the entire record. Virginia F. & M. Insurance Co. v. Bohnke, 4 App. D. C. 371, 378; Gorman v. Lenox, 15 Pet. 115."

Appellant, Plaintiff in Error here, had not indulged that oversight. On the contrary. The Commission is seeking to apply a general rule with many exceptions in a case where one of those exceptions controls.

Indeed, the expression of the rule "that a demurrer opens up *the entire record*" is broader than the rule itself. A demurrer to a return or answer does not open up the *entire record*, does not bring before the court the whole of the declaration, but only the substantive parts thereof and never the prayer thereof.

It seems trite to argue that a demurrer to an answer or return would bring up more or different matters or parts of the declaration for consideration in such cases than it puts in issue of the pleading to which it is immediately addressed: or, that at any stage in a proceeding a demurrer would put in issue for decision of the court on appeal more than it would put in issue if directed immediately to the pleading under consideration. Such a rule of law would be so illogical that it should not command any judicial consideration.

The rule of pleading both at common law and under the codes is well settled that defects in the prayer of a complaint or declaration, particularly the defect of asking too much or not sufficient, when measured by the allegations of the pleading, are not the subject of demurrer and can be properly reached only by motion to strike. The general rule is succinctly set forth as follows:

6 Ency. of Pleading and Practice at pages 350, 351, 352:

**PRAAYER FOR RELIEF.**—A demurrer will not lie to the demand of judgment or prayer for

*relief, unless there is some statutory provision which expressly authorizes it.* A complaint is not demurrable because it does not demand all the relief to which the plaintiff may be entitled. Nor, where the complaint shows a plaintiff to be entitled to some relief, will the fact that he claims more relief than he shows himself entitled to, render the complaint demurrable. The failure to pray for the precise relief to which the pleader is entitled is not a ground for demurrer; nor is the failure to ask for it in the precise form to which plaintiff is entitled, nor the fact that he has asked for improper or inconsistent relief, relief to which he is not entitled by the facts, relief which he does not need, or which cannot be granted.

A complaint is not demurrable for want of sufficient facts, because it contains no prayer for relief.

The objection to a defective prayer for relief must be presented by a motion to make the pleading more specific.

A digest of the settled principles supported by citation of all the authorities upon this point both under the codes and at common law is had in 31 Eney. of Law and Prae., 297 (1909), as follows:

**"DEMAND FOR INSUFFICIENT, EXCESSIVE, OR WRONG RELIEF.** Except where otherwise provided by statute, the demand for judgment or prayer for relief is generally not itself subject to demurrer. While in some of the states *where the common-law rules have not been abolished* a demurrer lies where the claim is in excess of the right disclosed by the declaration, *the general rule, even in the common-law states, is to the contrary.* Nor is it a ground for demurrer at common law that plaintiff asks for less

than is alleged to be due. And in the code states, if the complaint states a cause of action which entitles plaintiff to some relief, it is not demurable because insufficient, excessive, or the wrong relief or amount of damages is prayed for. So, in an action at law, if the only relief to which the party shows himself entitled is equitable relief, no demurrer will lie, and conversely." (Italics ours.)

The Supreme Court of Illinois has held to the same effect. In *Highway Com'rs. v. Jackson*, that court said:

An objection that the prayer in a petition for a mandamus is too broad cannot be entertained on appeal, as the court is not obliged to grant the prayer in its entirety, but only so much thereof as the petitioner is entitled to. *Highway Com'rs v. Jackson*, 165 Ill. 17.

In *State v. Crites*, 48 Ohio St. 142, the court said:

"The remedy by mandamus is to enforce civil rights, and why the proceedings therein should not be as elastic as in civil actions has not been satisfactorily answered by the cases that adhere to the rule. In civil actions no one would be heard to contend, at this late day, that because the plaintiff had claimed more than upon the trial he could maintain it would be fatal to his right to recover that to which he was entitled upon the facts and the law as they appeared upon the trial."

The rule of law that the prayer of a complaint, declaration or petition is a matter of *form* and therefore neither reached by demurrer nor carried back to the complaint or declaration by a demurrer to a replication or answer is well settled.

In Aurora City v. West, 7 Wall. 82 at page 94, the Supreme Court of the United States said:

"Apart, therefore, from their own demurrers, and solely by virtue of the plaintiff's demurrer to their rejoinder, the defendants may go back and attack the plaintiff's replications, but they can do so only as to defects of *substance*, as it is well settled that the rule applies only where the antecedent pleading is bad in substance, and that it does not extend to mere matters of *form*." (Italics ours.)

In Railroad Company v. Harris, 12 Wall. 79 U. S., p. 65, at page 84, the Supreme Court said:

"But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of *form* and not of *substance*." (Italics ours.)

In Park Bros. & Co., Limited, v. Kelly Axe Manuf'g Co., Vol. 49, Fed. Reporter, page 619 at page 622, the cases are reviewed and the rule thus stated:

It is undoubtedly a well-settled rule that a demurrer reaches back to the first error in the pleadings, and judgment may properly be given against the party who committed it. In Cooke v. Graham, 3 Cranch. 229-235, Chief Justice Marshall thus states the rule:

"When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be

scrutinized, and the court will notice what would have been bad upon a general demurrer."

The principle has no application, however, where the defect is one of *form* and not of substance. *Aurora City v. West*, 7 Wall. 82, and *Railroad Co. v. Harris*, 12 Wall. 84. In the present case the original petition, as first amended on the measure of damages, was not bad upon general demurrer. It states a good and valid cause of action against the defendant, whose demurrer thereto had been properly overruled. Upon what principle, then, could plaintiff's demurrer to the fifth paragraph of the answer operate to read into the petition the facts and averments set up in the fifth paragraph of the answer, on overruling plaintiff's demurrer to that paragraph, and thus make the petition bad? (Italics ours.)

In 16 Encyclopedia of Pleading and Practice, 776 (1899), the rule of both the code and common law pleadings is thus succinctly stated upon this point:

"NOT PART OF COMPLAINT. Although the codes, in enumerating the things which the plaintiff's complaint must contain, provide for a prayer for relief, yet strictly speaking the prayer is no part of the complaint, *at least in so far as complaints are governed by the general rule of pleading requiring the statement of a cause of action.* The prayer is only a matter of *form*, and, where a cause of action is stated, can not be reached by demurrer." (Italics ours.)

In *Erie City Iron Works v. Thomas, et al.*, 139 Fed. Rep., 995, at page 996, the United States Circuit Court for the Southern District of New York thus express the rule:

There are many cases to be found which hold that the prayer for relief is not demurrable, inasmuch as it does not sustain the nature of the action. O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Bateman v. Straus, 86 App. Div. 540, 83 N. Y. Supp. 785. And in 16 Ency. of Pleading & Practice, 776, it is held that, *the prayer being only a matter of form*, the cause of action, if properly stated, cannot be reached by demurrer. (Italics ours.)

It therefore follows that upon the state of this record the issues presented to this Court for decision are made up of the allegations of the answer or return and the allegations of the petition, under the rules of pleading in such cases, eliminating therefrom any consideration of the prayer of the petition.

An exact definition of the issues as presented in this case is set forth in the precisely parallel case of Woodruff v. New York & N. E. R. Co., 59 Conn. 63; 20 Atlantic Reporter, 17, at page 21. In that case the Supreme Court of Connecticut, quoting and following this Court, in discussing the effect of a demurrer to a return to a writ of mandamus, said:

"An argumentative denial is no denial. Viewed in this way, the demurrer to these paragraphs was properly sustained. We do not, however, rest our decision on this ground alone. 'If the pleading misstates the effect and purpose of a statute upon which a party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges.' Pennie v. Reis, 132 U. S. 470, 10 Sup. Ct. Rep. 149. 'A demurrer \* \* \* does not admit \* \* \* the accuracy of an alleged construc-

tion of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties, when not justified by the language used.' Dillon v. Barnard, 21 Wall. 437.

The eleventh paragraph is somewhat more full in its statement than the tenth. It says that at the time when the order of the Commission took effect, viz., 30 days after the new depot was occupied by the railroad, the said New York & New England Railroad Company did not have any such surface tracks anywhere within the limits named in said order as could in any event have anything to do with the intent and purpose of the said resolutions of the general assembly, under the plans adopted either by said board of Commissioners or by the plaintiffs assuming to act as such. A demurrer to such a pleading does no more than refer to the court the construction of the legislative resolution."

Under the rules of the codes of the several states and of the common law any imperfection in the pleadings upon appeal, at least, are of more importance in the particulars discussed than in the courts of the United States.

Section 954 of the Revised Statutes very much simplifies such matters in the United States courts and renders it within the power of even the appellate courts, after construing the pleadings and after ascertaining therefrom any relief whatsoever petitioner is entitled to, so to decree, and, upon remand of the case to the lower court, to direct by that decree that such court permit such amendments to the pleadings as will conform them with what shall be deemed and decreed in the premises.

The Federal Statutes Annotated, Vol. 6, second edition, page 98, thus reads:

Sec. 954. [Defects of form—amendments.] No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions, as it shall, in its discretion and by its rules, prescribe.

Wherefore, it is respectfully submitted to this Honorable Court, that the prayer of the petition herein was not before the Court below for construction; that it is not before this Honorable Court for construction; that this Honorable Court will look to the allegations proper of the pleadings in its determination of the issues here presented; and, so determining, will accordingly so decree, and, if necessary, direct the Court below to allow the pleadings to be amended accordingly.

#### **THE SPECIFIC ISSUES MADE BY THESE PLEADINGS**

With great caution and care the specific demands of the petitioner were fully and fairly stated to the trial

tribunal in writing (Record Folio 15), long deliberated upon and thereafter specifically answered by the Commission in writing as to everyone of the precise, distinct and separate demands (Record Folio 16). Each of these requests or demands is specifically set forth in the petition herein (Record Folio 13), and likewise in respondent's answer *verbatim et literatim*, together with respondent's separately stated written reasons for not answering each and every one thereof (Record Folios 91 and 97).

There are, therefore, presented to this Honorable Court by the pleadings in the case definite and specific statements of the exact items of costs and every of them sought to be obtained by petitioner. Irrespective of the prayer therefor the pleadings in the case leave no doubt as to the precise items sought by this petition, and that they were definitely and individually understood and denied by appellees.

The right of cross-examination sought by appellant is to have witness petitioner Graff recalled and answer the specific questions propounded to him which he refused to answer at the hearing, which refusal was sustained by the Commission upon the ground that the question related to "competitive information." These questions are clearly and separately set forth in the petition (Record Folio 23) and relate; (1) to the annual *output* of the factory at Seattle; (2) the cost of *labor* in the factory at Seattle; (3) the cost of *power* in the factory at Seattle; (4) the cost of *materials* in that factory.

Said pleadings, both the petition and the return, set out in full the specific and separate requests in writing made by appellant for the right to inspect, to offer evidence as to and to be heard upon, certain specified

evidence or data then and now in the possession of appellee and upon which appellee was then proceeding to make report to the President (Record Folio 13). Said pleadings further show that appellee, after long deliberation upon said *written* requests, made specific denial in writing thereto, setting forth their reasons for so doing as to each of said requests separately (Rec. Fol. 16). Said demands were as to aggregate costs of production and as to each separately specified item thereof then in the possession of the Commission and accepted by it as evidence, being the data upon which appellee was then holding a public hearing, for the purpose of submitting to the President a report upon said costs of production.

And the said denials in writing of appellee were so related. Said requests were as follows (Record Folio 13) :

1. Reasonable opportunity to inspect and to be heard upon all evidentiary matter received or to be received by said Commission upon which it was to and did proceed in the particular case and not deemed to constitute trade secrets or processes.
2. That the relator Plaintiff in Error be permitted to examine and controvert any evidentiary matter submitted to the Commission with respect to the petition filed herein by, the number of laborers employed by, and the wages paid them by the American Nitrogen Products Company in its plant at Seattle.
3. The right to examine and controvert any evidentiary matter submitted to the Commission respecting the capital stock and investments of the American Nitrogen Products Company and the cost of its plant at Seattle.
4. The right and opportunity at public hearing to

cross examine the experts of the Commission who received information from the American Nitrogen Products Company, from persons in the United States and from persons in foreign countries, upon the subject of sodium nitrite and to offer testimony in contravention thereof and to be heard in argument thereupon.

The answer and return of the Commission in this proceeding for all present purposes may be said to be an admission of the requests made, their denial, and a justification of their denial upon the ground that the requests related to "trade secrets and processes" within the provisions of Section 708 of the Act of 1916. No other justification is essayed. No other defence is made.

The position of the Commission is that *all costs of production* and *all items thereof* individual or otherwise are such trade secrets or processes (Record, folio 85).

Why they should apply that rule to the costs of production ascertained from *public sources* in Norway, and deny Plaintiff in Error inspection of the same, seems not to have been defended.

Why they should make public their estimated cost of production of nitrite in Norway (page 5) wherein they allege there is but *one* producer (Brief, page 2) and refuse to make public their estimate of that cost of production in the United States (page 5) where there are *three* producers (Record, folio 86) upon the grounds that it would disclose their trade secrets and that the Commission was therefore so inhibited under penalty by Section 708, Act of 1916, is beyond this limited understanding.

Since the command of a public hearing and right accorded interested parties by Section 315 (c), (Rec-

ord, folio 24), "to be present thereat to produce evidence and to be heard," *relates solely* to data, evidence, and hearings *upon the subject of costs of production*, if *all such data in all cases and under all circumstances are trade secrets or processes* within Sec. 708, why a "public hearing?" Why "be present," and upon what are interested parties "to be heard?"

What effect have the words "to be present" when related to the "public hearings" of the Commission. Do they relate to only a *part* of such "hearings" and that when interested parties are producing evidence which will be considered on final report to the President? If so what language of the statute so limits?

Certainly it must be apparent even to the layman that *all costs of labor, costs of power, costs of material and costs of plant construction* cannot be trade secrets or processes; and that, if any or all such may at times under peculiar conditions be trade secrets or processes, they are not and cannot be such always.

### **THE APPLICABLE STATUTES**

There is no statutory authority for the Commission to deny petitioner the remedy sought.

The applicable statutes are: (42 Stats. 941.)

Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do

not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classification or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

\* \* \* \* \*

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be

issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. (Italics ours.) \* \* \*

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

By Sections 318 (a) and (c) of the said Tariff Act of 1922 (42 Stats. 946) it is provided:

Sec. 318 (a). That in order that the President and the Congress may secure information and assistance, it shall be the duty of the United States Tariff Commission in addition to the duties now imposed upon it by law, to— \* \* \*

(e) In carrying out the provisions of this section the Commission shall possess all the powers and privileges conferred upon it by the provisions of Title VII of the Revenue Act of 1916. \* \* \*

Sec. 701 of Title VII of the Revenue Act of 1916 (39 Stats. 795) among other matters, enacts:

The principal office of the Commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The Commission may, by one or more of its members, or by such agents as it may designate, prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country.

Section 706 of Title VII of the Revenue Act of 1916 (39 Stats. 797) in part, provides:

Sec. 706. That for the purposes of carrying this title into effect the Commission or its duly authorized agent or agents shall have access to and the right to copy any document, papers, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, co-partnership, corporation, or association to produce books or paper relating to any matter pertaining to such investigation. Any member of the Commission may sign subpoenas, and members and agents of the Commission, when authorized by the Commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

\* \* \* \* \*

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under this title at any stage of such proceeding or investigation. Such deposition may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person, firm, co-partnership, corporation, or association may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

Sec. 708 of Title VII of the Revenue Act of 1916 (39 Stats. 798) provides:

Sec. 708. It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said Commission, or any other officer or employee of the United States, to divulge, or to make known *in any manner whatever not provided for by law*, to any person, *the trade secrets or processes* of any person, firm, co-partnership, corporation, or association embraced in any examination or investigation conducted by said Commission, or by order of said Commission, or by order of any member thereof. Any offense against the provisions of this section shall be made a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. \* \* \* (Italics ours.)

Bearing in mind that the foregoing provisions of law are member provisions of the same act, to wit, the Tariff Act of 1922, it will be instructive of the purpose of Congress to read the several provisions together so as to give some distinct force and effect to each thereof in accordance with the well-known rule of statutory construction to that effect.

It should be borne in mind that Section 708 was enacted by Congress before the Commission was invested with the power of "hearings" provided by Section 315 (c). It will be noted particularly, that Section 708, is confined to *members* of the United States Tariff Commission, *employees, agents* and officers thereof. It does not extend in language to the Commission as such. That this limitation of the provisions of Section 708, was advisedly so enacted is shown by the internal construction of the *various* provisions *in pari materia*. Thus Section 701 and Section

706 are extended to "the Commission." Likewise in Section 708 Congress speaks of "an investigation conducted by said Commission or by order of said Commission." At the time of this enactment, therefore, Congress had clearly in mind the difference between acts of the Commission and acts of a member or agent of the Commission, and differentiated between them in prescribing the duties and powers set forth in these paragraphs.

The rights of interested parties prescribed in Section 315 (c) are therein imposed as duties of "the Commission" and are invested as rights which must be accorded *by the Commission*, not at all times, but only attaching to and during "its hearings." Obviously there is a sound and logical legal reason why Congress might desire to inhibit a member or agent of a Commission quietly and clandestinely disclosing trade secrets thereof, and at the same time would not attach that inhibition to the more solemn proceedings of the Commission itself sitting as such and acting according to combined wisdom of all of its members or a majority thereof.

Moreover, Section 315, was the investment of an entirely new duty and function upon the Commission as a part of a legislative scheme to take tariff making away from the seclusion and secretiveness of committees of Congress and place it within the powers, in so far as the investigations at least were concerned, of a public tribunal empowered and directed to hold public hearings and to take evidence and sift facts. It marked the difference between the secret proceedings of the committees of Congress and the public proceedings of an independent commission.

Again reading Section 315 (c) and Section 708 to-

gether it will be observed that the language of Section 708 makes that provision inapplicable in the presence of any such statutory enactments as are found in Section 315 (e). It is expressly provided in Section 708 that members and officers of the Commission shall not "divulge or make known in any manner whatever *not provided for by law* the trade secrets or processes of any firm," etc. In the presence of a statutory requirement, therefore, that invests the interested parties appearing with the right to be heard upon the evidence in the case, Section 708 by its own exclusive language, does not apply. In that status we are to read the two provisions of law together giving full force and effect to each, which can be done, and alone can be done by applying Section 708 in all cases except where otherwise provided as in 315 (e) in cases where the Commission is holding one of "its hearings."

Furthermore, the penalty prescribed by Section 708 is obviously a personal penalty running to individuals and not intended to apply to the Commission acting as such. The statutory deduction, therefore, is, that reading all these provisions together, Section 708 does not apply in cases where the Commission is conducting one of its hearings and that in such cases the right to be heard accorded interested parties appearing there is a right unlimited by the statute and consequently a right to be heard upon all, and not a part, of the evidence upon which the Commission intends proceeding to its conclusion.

As parts of the same act with Section 315 are Sections 402 and 501 defining "cost of production" as the basis of import duties and delegating to the appraising officers and board of appraisers the function of determining the same. Aid, therefore, will be had

in this determination by invocation of the well-known rule of statutory interpretation, that each paragraph and section of the act must be read and interpreted in the light of the others, and that the expressed purpose of Congress upon the same subject matter in the one may be held to explain the same expressed purpose in another provision of the same act. By Section 402 (e) cost of production is defined. That definition includes as part thereof "the cost of materials of, and of fabrication, manipulation, *or other process* employed in manufacturing or producing such or similar merchandise \* \* \*" Thereafter follow other elements of cost of production.

Prior to the Tariff Act of 1913 there was no provision of law requiring public hearings or permitting interested parties to be present, to cross-examine witnesses, or otherwise be heard in appraisement proceedings. Therefore it had been uniformly held by the courts that such right was not allowable. The reason for that rule is typically set out in *Auffmordt v. Hedden*, 137 U. S. 310, at page 323, that the right to import merchandise into the United States was not a fixed or absolute right in the citizen but one completely within the determination of Congress, and, therefore, that the Congress had the power to accord the right to allow imports upon such terms and conditions as the Congress deemed wise and provided. These provisions, therefore, became conditions precedent to the exercise of that right, and Congress not having prescribed therein the right to be present, or to produce evidence, or to be heard, in appraisement proceedings, the right did not exist. However, in the development of time and in response to what was evidently the logical right of interested parties, this right was in 1913 accorded by statute.

By Section 501 of the Tariff Act of 1922, a companion section in the same law here under consideration, that right is established in these words:

"Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the Board of General Appraisers and shall be assigned to one of the general appraisers, who shall ascertain and return the value of the merchandise and shall give reasonable notice to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits of persons whose attendance can not reasonably be had, price lists, catalogues, reports or depositions of consuls, special agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be considered."

It is significant that for the first time Congress by the same section provided a right of appeal from the decision of the appraisers as to what constituted market value or the cost of production *upon questions of law only*, thereby indicating a purpose to provide a review by the courts of such questions as here presented.

It is also important to note that co-existent with this right granted interested parties to appear and cross-examine witnesses in reappraisement cases, and examine all documents admitted in the case by the appraisers, there existed upon the statute books Section 3167 of the Revised Statutes as amended by 40

Statutes 311, and, by virtue of art. 1184 of the Customs Regulations of 1915 having the full force and effect of law, provisions defining penalties for the disclosure by customs officials of information gathered by them in the performance of their duties similar to the provisions of Section 708.

If we read Section 708 in the light of Sections 402 and 501 we will therefrom ascertain that it is not the fixed purpose of Congress, where public hearings are granted in the ascertainment of cost of production, to deny the right of examination of all papers and documents upon file regardless of to whatever subject they relate, and particularly those relating to the subjects declared to be elements of cost of production in Section 402, to wit, cost of materials, fabrication, manipulation and "other process" employed in manufacturing or producing merchandise. On the contrary, reading 708 in the light of 402 and 501 there is evidence of a positive purpose in Congress in the public hearings provided for tribunals invested with the power of determining cost of production to permit inspection of all papers and documents and the cross-examination of witnesses called to establish the same and to examine all evidence relating to cost of materials and manipulations and processes. By virtue of the rule of construction stated we must attribute a uniform purpose to Congress in the enactment of the associate paragraph of the Act 315 (c).

Indeed, the Board of General Appraisers, now the United States Customs Court, since 1890, and appraising officers for more than a century, have been empowered by Congress to find and have been finding "cost of production" as a factor determining the amount of our import duties, precisely as this act empowers the

Tariff Commission to perform the same function. Since 1913 the former proceed publicly and under a law requiring inspection of all data before them as stated. They are daily exercising that function and, since the same function was bestowed upon the Tariff Commission, have probably made hundreds of such determinations where the Tariff Commission has made one. They perform these functions at New York and all the different ports throughout the United States, according interested parties all their rights without complaint, dissention or public clamor. Their powers are derived from and functions prescribed by the same act, Tariff Act 1922. Is it possible that Congress by the same act provided these same functions to be performed by the Board at all ports of the country with full and complete rights of interested parties of inspection, cross-examination and disputation of all data as to cost of production, after due notice and, to be performed by the Commission at Washington without these rights, clandestinely, and with inspection of data inhibited by fine and prison offense? Reading the two provisions of the same act together compels a negative answer.

The learned Court below, following the *inclinations* of the Commission's answer and return as hereinbefore considered finds no different functions conferred upon the Tariff Commission by Sec. 315 of the Tariff Act of 1922 other than provided by the Act of 1916, and, therefore, concludes the provision according interested parties the right to be present and to be heard without any force or effect as it was not accorded by the latter act. While we are unable to follow this legal conclusion for numerous reasons trite of statement, we are willing to accept the legal corollary. Under the act of 1916, with Sec. 708 as a member provision

thereof, the Tariff Commission reported *only* to Congress. *When so reporting every fact found and all data collected by them relating to costs of production became a public record.* What therein therefore argues such should not be now disclosed when by that act it is required they report *to Congress and the President?*

Moreover, Sec. 318 *of this Act* requires the Commission to collect data as to "costs of production," "costs of conversion," etc., and, when so requested, report the same to Congress and to the President. *When costs of production and costs of conversion are reported to Congress thereby they become public records under this very act.* In the presence, therefore, of parts of the same act commanding the Commission to collect data as to "costs of production" *and make the same a public record*, how can it be said it was the purpose of Congress to punish the permitting of inspection of the same as commanded in another part of the same statute?

Furthermore, in reply to the challenge that the Commission performs the function of Congress and its Tariff Committees reference is had to the "Hearings of the Ways and Means Committee" for decades. Therein are recorded the voluntary printed statements of the principal manufacturers of the United States in detail of their costs of production and every item entering therein, printed by Congress, distributed and open to the world. Yet the answer and return of the Commission and conclusion of the court below seems to be that *all* items of cost of production are "trade secrets" and no one thereof can be revealed by the Commission. To what then does this provision relate, giving the right at their public hearings to interested

parties "to be present," "to present evidence" and to be heard? The *only* possible inquiry thereat under the law is as to "costs of production," and if these costs are "holy to the view" this act is dismembered of this legal right and a dead letter of the law.

The argument below reflected in the opinion of the court (Rec. folios 130-131-132) that disclosure of petitioner's costs of production and that of others here sought would render nugatory the flexible provisions of the tariff and work grave injustice to competition in trade is completely disproved by the public facts just stated. If this point be true then the point last made, to wit, that the disclosure of costs of production by the Finance Committee of the Senate and the Ways and Means Committee of the House, submitted thereto and published thereby in support of the Tariff Act of 1922, and all previous acts, by various manufacturers and producers throughout the United States, being a disclosure of their trade secrets, to wit, costs of production in minute detail, was a gross act in complete destruction of all the protective work undertaken in that act.

Whoever maintains or asserts that the successful American manufacturer or producer, as a rule, is not fully and completely advised of foreign cost of production in detail, of the like article produced by him, does not appreciate the keen acumen and disregards the business information of the American business man. Advertence to the hearings before the Ways and Means Committee above referred to will disclose that the American manufacturer not only knows and is willing to set forth in public, his own costs of production, but those of his competitor in foreign countries.

If any argument were necessary to show that this contention is without foundation we need but refer to the Commission's answer to this return (paragraph 16) (Rec. folio 61) and the "Summary of Information in the Matter of Sodium Nitrate, the subject of public hearing September 10, 1923," submitted by the Commission in this case. Therein, after alleging that Plaintiff in Error denied them access to its books upon cost of production, nevertheless, this Commission through special agents and experts ascertained the cost of production of nitrite in Norway from "public sources" and set forth the same in detail in said summary, and alleges the same in their verified answer in this case, to amount to 4.84 cents per pound. (See paragraph 16 Answer of Respondent.) (Rec. folio 61.)

Moreover Congress has by subdivision (e) of Section 315 provided a full and complete method whereby the United States Tariff Commission, proceeding under this section, can ascertain costs of production in the United States and in any competing foreign country *without sending a single agent or making a single effort beyond its doors.*

Therein it is provided as follows:

"(e) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling price of domestic and

foreign articles in the principal markets of the United States; (3) advantage granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition."

This authorized method of the ascertainment of cost of production by the United States Tariff Commission is not unlike, but quite parallel with, the provisions of the several tariff acts of the last quarter of a century providing an alternative method whereby appraising officers could find market value, *including cost of production*, in the absence of any sufficient data therefor. See: Sec. 11, Customs Administrative Act of 1890; Sec. 32, Tariff Act of 1897; Sub. Sec. 11 of Sec. 28, Tariff Act of 1909; Paragraph L of Sec. III, Tariff Act of 1913; Section 402, Tariff Act of 1922.

Under these authorizations of the law, similar to that as stated in Sec. 315, long exercised by appraising officers, the United States Tariff Commission is legally authorized by Congress, in its ascertainment, to take into consideration the wholesale selling price in the markets of the United States of any product the subject of inquiry under Sec. 315, and, work back therefrom to the cost of production, either in the United States or abroad, as the requirement may be. The ascertainment provided by this section of the law is simple and efficient. For example, in the ascertainment of the cost of production of nitrite in Norway, the Commission would first ascertain the wholesale market price in the principal markets of the United States; therefrom deduct transportation, insurance, duties, and other charges. Thereafter ascertain the reasonable and ordinary profit upon this or similar

lines of merchandise. This resultant would be a tentative cost of production abroad.

There is no limitation in the law upon what would be fixed as a reasonable profit by the Commission in any case. The cost of production thus tentatively ascertained by the Commission could be published in due course of its proceedings with notice to parties that it would be adopted for the purposes of the Commission in the particular proceeding unless foreign or domestic producers disproved it. Thus briefly outlined, this procedure could be made to apply to domestic and foreign producers. Thus briefly outlined the existing law provides a method whereby this Commission proceeding under its existing powers could under proper rules put the burden of proof of showing cost of production abroad upon the foreign manufacturer or producer or his agent in the United States, and, likewise as to the domestic manufacturer or producer.

*Now, that is exactly what has been done in this case as to foreign manufacturer and producer.*

This Commission in its summary submitted for disproof, has adopted for a tentative finding as to the cost of production abroad of nitrite obtained from public sources and without being given the costs in the sole factory of nitrite in Norway. They have called upon Plaintiff in Error to disprove the same. Plaintiff in Error asked for sufficient time to gather evidence therefor and was denied a sufficient time. So that from the foregoing, complete answer is had by this record and the proceedings of this Commission to the contention that the granting of this mandamus would destroy the Flexible Provisions of the Tariff Act of 1922, and work injustice to all competing interests.

## WHAT CONSTITUTES A TRADE SECRET OR PROCESS?

The Commission in its brief before the Court of Appeals (pp. 49, 50) vouchsafed the following regarding trade secrets and processes:

"It may well be that the law of unfair competition in its crude beginnings was primarily concerned with the protection of trade secrets in the sense of secret formulas or processes; but the law has long since outgrown that restricted conception. The development of our complex industrial and commercial life has brought a realization that a particular combination or arrangement of productive factors may be the key to the success of a particular manufacturer. Hence the legal concept of trade secrets has gradually broadened and deepened."

To the mind of both layman and lawyer there is a vast difference between "trade secrets and processes" and production costs of labor, power, material, etc. It will inevitably happen, therefore, as recorded in the Commission's said brief that notwithstanding the most indefensible and vagrant assertions that *all* such costs are trade secrets and processes, when such minds essay the task of recording a definition of the latter, exactly or something very akin to what was evolved by appellees, *supra*, will result. These distinctions are so fixed in the human mind that no degree of prejudice, effort, or romancing in foreign fields of thought can impair or pervert the true conception of those terms into any other, different or more exact compass than is, as aforesaid, by appellees elementally defined.

If we may paraphrase a concise definition of "trade

secrets and processes," as recognized by the law, constructed of appellee's constituent specifications, we would respectfully suggest as follows:

*"Any secret formula or process including any particular secret combination or arrangement of productive factors known only to certain producers using it in the production of the particular article and which is the key to the success of the particular manufacturer."*

It will be both interesting and instructive to read in connection with this definition, bottomed upon the Commission's conclusion of the modern scope of these words, their definition by the Supreme Court of the State of Washington in *In re Bolster*, 110 Pac., 547, 548; 59 Wash., 655, as follows:

*"The term 'trade secret,' as usually understood, means a secret formula or process, not patented, known only to certain individuals having it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on."* (Italics ours.)

Now let us proceed to test the specific demand of Plaintiff in Error herein by this conception of the Commission of the modern legal inclusiveness of "trade secrets and processes."

The Commission's contention is, first, that *all* data as to costs of production are trade secrets and processes. It will be particularly noted that *this answer or return does not allege any facts which would make all or any of the particular items herein requested trade secrets or processes in the particular case*, but

justifies as a matter of law alleging that such items of costs in all cases and under all conditions and circumstances are trade secrets or processes.

Accepting the Commission's definition of trade secrets or processes to be true, or, in any status that costs of production and any items thereof are not such, in order that the answer and return may make a legal defense, it should allege the fact that the costs of production and every item thereof demanded is the product and result of a peculiar secret formula or process or the product and result of a peculiar secret combination or arrangement of productive factors which is the key to success in the particular factory known only to certain individuals using it in the production of the particular article which would be disclosed to their injury by an exposure of its costs of production or of a named particular item thereof. This return and answer contain no such allegations. There is a vast difference in pleadings between an allegation that costs of production and items thereof are "trade secrets or processes," a statutory legal term, the legal interpretation of which appellee's brief shows has frequently been adjudicated by the courts and is here presented for *interpretation, an allegation of a legal conclusion*, and an allegation that costs of production and items thereof are the result of secret processes or the product of secret formulas, allegations of *facts*. In mandamus proceedings an argumentative denial is no denial. Denials consisting of a legal construction or conclusion are no denials. Woodruff vs. New York & N. E. R. R. Co., 59 Com., 63, *supra*.

Now let us apply the definition of "trade secrets and processes," evolved as aforesaid to a few of the facts of this proceeding.

1. One of the questions asked Mr. Graff was as to "capacity of his plant" at La Grande, Washington. He declined to state, saying: "We consider the exact capacity of the plant a trade secret," and in that he was sustained by the Commission. (Record, Folio 13.) Just *how* that would disclose any trade secret or process employed therein by the witness he and respondents failed to show. It would require some elastic mental operation to so demonstrate.

In a detailed and complete work entitled "Report on the Fixation and Utilization of Nitrogen," made by an exceedingly able Commission therein named, and published by the Government Printing Office, 1922, a public source of information, every process of the production of nitrite known and that employed in every plant in the World, including that of Mr. Graff at La Grande, is fully described. Therein it is shown, page 61, that Mr. Graff employs the "arc" process, and, that the annual capacity of his plant is "300 metric tons," equal to 330 short tons. So in a public document, upon information no doubt contributed by Mr. Graff, entitled "Supplement to Commerce Reports," at page 38 is given under the title "Production of Sodium Nitrite at La Grande, Washington," the total output of Mr. Graff's plant for every year, 1917 to July, 1923, inclusive. And this is the Commission's conception of a trade secret or process! This is one of the items entering into cost of production denied Plaintiff in Error herein!

Another question which Mr. Graff refused to answer and was therein sustained by the Commission, and which this proceeding seeks to compel, is (Rec. folio 13), "How much do you estimate as the cost of your power?" In the first aforesaid publication is pub-

lished the cost of power, *and the relative costs of power*, in every known and different process of the production of nitrite of the world including the "arc" process and including that of many individual plants. Moreover this Honorable Court will take judicial notice of the fact that all power costs, in this age and day are regulated by law, statutory or by ordinance, and therefore public.

If, therefore, disclosure of power costs would disclose the trade secrets or processes of the particular consumer, every such of practically every manufacturer in the United States so using, is thereby disclosed by statute or ordinance. Is what the law makes public for most men the trade secret of another?

The record shows (Folio 16) that one of the specific demands denied Plaintiff in Error upon the grounds that it would disclose the trade secrets or processes of Mr. Graff, was as to the wages paid in the plant at La Grande. Passing by the fact that wages paid in most factories are today regulated by trade union schedules, known or easily discoverable by all, one is at loss to understand how the wages paid a particular man or number of men is or could be any index to whether or not he was employed about a secret *process*. Or, more amazing, how disclosure of that wage would disclose the secrets of that process!

The United States Government in the Navy, Army and many other departments employs hundreds of men operating secret formulas and processes upon which the life of the nation depends. Do their wage schedules all graded by law disclose any of these secrets? Almost every drug and chemical manufacturer in the country has some preparation which it daily vends upon the markets the secret formula of which is

known to certain of its employees. Would the wage paid such if known reveal that secret formula?

Even more remote are the items of the "cost of plant" and "capital stock" of the La Grande plant, inspection of which and the right thereafter to be heard upon which data was denied Plaintiff in Error upon the grounds that the same were trade secrets or that such would disclose the trade processes of that company. (Rec. folio 97.) The Proposition is too absurd to warrant discussion.

The demand of Plaintiff in Error (Rec. folio 97) to cross-examine experts of the Commission denied by the Commission can be justified only upon the grounds that that right is not legally included within the right to a "public hearing," "to be present" thereat and "to be heard" upon the case. No additional considerations to those had in appellant's opening brief will here be had. It seems plain, however, that if interested parties are afforded by this statute any rights whatsoever they must include, at least, the right to inquire if the data collected, digested and presented against their interests has been so done by capable and qualified agencies, acting in accordance with the statute, and accepting and producing only such evidences as the statute permits. For example, if they on examination were found to be entirely unversed in the subject investigated or interested or biased as to the particular subject, or if they accepted statements from uninformed witnesses or without the sanctity of oath, interested parties have a right to so know, and accordingly "be heard thereupon."

The fact that members of the Commission may and do so cross-examine only proves Plaintiff in Error's case; for it is a mental impossibility that any six men

would or could be qualified or so well qualified to develop the true factors of the myriad of intricate and scientific subjects this Commission investigates. Nothing short of experts in every particular line of known production, and the trade relating thereto, can so do. Nothing short thereof will ever adequately administer the flexible tariff.

No alarm need be engendered by apprehensions as to every ruling thereof upon questions of law being made the subject of court action. The rule invoked now exists in all courts.

*If the Commission will rule in accordance with the law not a single such case need be feared.*

Three co-ordinate Boards of General Appraisers have for decades been performing like functions and daily making like decisions with ridiculously few court reviews thereof invoked.

If the report made to the President serves no other purpose in this proceeding it demonstrates the dire necessity for judicial determination of the questions of law arising therein in order that the United States Tariff Commission may function. That report shows the Commission hopelessly divided upon several important questions of law, debate of which within the Commission, at least the time required for putting their antagonistic views in writing, consumed time which may easily have enabled them to consider and report other cases. Will these differences be left undecided by the courts and thereafter the Commission proceed undisturbed thereby, or will they with innumerable other questions of law be left undecided and ever a stone in the road of the Commission's labors?

In exact accord with the foregoing is the logical

and clearly expressed opinion of the Court of Appeals below (R. 98-99) as follows:

"Barring trade secrets and processes the disclosure of which is expressly forbidden, the opposition by virtue of its statutory right to be heard, was entitled to be informed of the facts and evidence privately presented to the Commission for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, under the rules of the Commission itself, the Norwegian Nitrogen Products Company should have been given an opportunity to examine the record and the reports of the Commission or investigator in charge of the investigation.

"The term 'trade secrets' as ordinarily understood, means an unpatented secret commercially valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

"There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.

"Costs of production of and by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

"Business privacy will be protected, it is true, from mere fishing expeditions in search of evidence (Federal Trade Commission v. American

Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of business privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. *Bank of Columbus v. Okely*, 4 Wheat. 235-244; *United States v. Louis. & Nash.* R. R. 236 U. S. 318.

"As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States on the sole ground that such facts, data, information, evidence and reports were confidential and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute."

#### **HEARING AND RIGHT TO BE HEARD**

At the hearing below the contention was made that the relief sought in this proceeding would require the United States Tariff Commission to afford opportunity to be heard by interested parties in all quarters of the globe, wherever and whenever the Commission, through its duly qualified agents, was making investigations. This contention ignores completely the law. The sections of the statutes in question, Section 315 (e) of the Tariff Act of 1922 and Sections 706 and

708 of the Revenue Act of 1916, incorporated in and made a part of the Tariff Act of 1922, distinctly differentiate between the proceedings of the Commission, sitting as such and holding one of "its hearings," and the investigations by the Commission through its agents, provided in said Section 706. These investigations the law provides may be made by the Commission delegating one of its members, or one of its agents or by deposition. The statute distinctly differentiates between these functions of the Commission. A case may be pending in this court, and this court make an order for a deposition in the case. When that deposition is returned to the court it is not a part of its hearings until it is admitted in evidence. So, the data and testimony gathered for the United States Tariff Commission by its agents, or by depositions are not a part of any one of "its hearings" until they are admitted in evidence in a particular case, or taken off the files of the Commission and received or adopted by the Commission as a part of the evidence in a particular case and made thereby evidence upon which they are to base their ultimate finding in a particular case. This accords with the legal definition of "hearings" requiring that there must be a "receiving of testimony or facts and argument thereon."

An examination of the record will disclose that the demands of Plaintiff in Error herein, particularly in the specific questions addressed the Commission, relate solely to those evidentiary matters which the proceedings of the Commission disclose had been made a part of "its hearing" on September 10, 1922. The requests of appellant are strictly confined thereto and not to the examination of all the data and all the information which may have been gathered by the agents

of the Commission in the field, but it is insisted that whenever, by public or private proceedings the Commission after listening to its agents and after going over what they have collected *accepts it as a part of the data for the purpose of proceeding to a conclusion in a particular case*, that action of accepting the selected parts constitutes a "hearing" and that data so selected to be acted upon is the subject of the right given by Section 315 (c) to interested parties "to be present to produce evidence and to be heard thereupon."

The statutory right accorded by Section 315 (c) is, "The Commission give reasonable public notice of its hearings \* \* \* shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." There are here accorded three distinct rights. One of the fundamental rules of statutory construction, well known to all, is that in construing a statute some different office or effect must be given to each and every part thereof and to different words used therein. In construing this act, therefore, we must, if possible, assign to the words "to be present," and "to produce evidence," and "to be heard," some different and distinct office or right established. It will not be assumed that Congress re-peated itself. Statutory tautology is to be abhorred. What then is the legal effect of each of these phrases, and what construction must be given to each to accord to it some office and effect not included within the others. It is well settled in the law, as decided in *Dundee Mortgage Trust Invest. Co. v. Charlton*, 32 Fed. Rep. 192, 194, that a statutory "right to appear" (or right "to be present,") which are co-extensive terms, includes something more in that right than to

stand mute in the presence of the officer or tribunal before whom that right is accorded. The import of such words is clearly defined in that case as follows: “‘Right to appear,’ as used in a statute authorizing persons interested in a tax assessment to appear before the board of equalization, ‘implies the *right to be heard* in reference to the assessment.’” So that by the first two phrases the rights by this law accorded interested parties include all rights which it is contended by the respondents are here invested, to wit, the right to offer argument and the right to present evidence. If, however, we must give any force and effect to the last phrase it accords something beyond the right to offer argument and to offer evidence in the case. In order to give the latter phrase any force and effect whatsoever it must be extended beyond the bare right of argument and the bare right of presentation of evidence.

“The *right to be heard*” has received judicial interpretation not only in criminal but in civil cases. Thus in *Mitchell v. State*, 22 South. 71, 72, 114 Ala. 1, the Supreme Court of Alabama said:

“The *right to be heard* by himself and counsel, or either, guaranteed by Const. Art. 1, Par. 7, is the right of the accused to be heard by counsel before *the court and jury on any and every point involved in the issues on which the jury are to render verdict*. The whole case is open for *every discussion*, and the counsel may suggest for the consideration of the jury *any and every fact and circumstance which may be in the evidence*, and draw from them such deductions and inferences as may seem to him fair and reasonable, leaving to the jury to pass on the force of the suggestions he may submit.”

The very essence of a hearing, however, is the *right*, not simply the privilege, "to support one's contention or position by argument, however, brief, and if need be by proof, however informal," before a tribunal authorized to act and *willing and ready to do so*.

*Stuart v. Palmer*, 74 N. Y., 183, 30 Am. Rep. 289.  
*Denver v. State Invest. Co.*, 112 Pac., 789 L. R. A. (U. S.) 395, 398.

To the same effect see *State v. Rogoway*, 81 Pac. Rep., 234, 235, 45 Oregon, 601; *Wingo v. State*, 62 Miss., 311; *Yedell v. State*, 100 Ala., 26.

The rules of the Commission, which, in so far as they accord and do not conflict with the Statutes, have the force of and are law, (*Haas v. Henkel*, 216 U. S., 462) accord Plaintiff in Error, *in some particulars* the rights in this case denied by this proceeding sought:

These rules provide:

(a) (Record, page 73.) Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the *report* of the commissioner or investigator in charge of the investigation and *also the record* except such portions as relate to trade secrets and processes. (Italics ours.)

Clearly this rule accords interested parties appearing not only the right to examine the "reports" of "investigators" as well as "commissioners," but also the "record," or facts upon which such is based, precisely what was here demanded, refused and by this proceeding sought. (Record, page 12, and particularly folio 17.)

The rules of the Commission further provide:

"(b) (Record, pages 73 and 74.) *Final hearings shall be before the Commission.* Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law."

Any effective administration of this rule requires the *final summary* of the Commission should be submitted to interested parties and that they thereupon be heard. The rule itself entitles them to "file briefs" thereupon. Common justice requires this right and that these briefs when filed should be forwarded to the President, for he alone decides the case and fixes the rate. But how can briefs of any value be filed upon a "summary" without knowing the "record" or facts supporting the same?

This record shows nothing submitted to interested parties appearing save the "summary of facts" "*the subject of the hearing September 10,*" submitted September 16, 1923!! No hearing of any kind was allowed after October 6, 1923. The "Report to the President" made by the Commission shows the "Advisory Board's *Final Summary*" was not made to the Commission until October 29, 1923, long after further "hearings" were denied appellant.

Precisely analogous acts providing "hearings" have been construed by this Court.

Section 20, Interstate Commerce Act of 1906, 34 Stat. L. 594, 4 Fed. Stat. An. 505, reads:

"(Sec. 20 continued. (H) EXAMINER DIVULGING FACTS, ETC.—PENALTY.) Any examiner who divulges any fact or information which may come to (sic) his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon any conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both."

Like this act, which provides certain investigations by the Tariff Commission of its own motion as well as by direction of the President, that Act by Sections 12 and 13, 36 Stat. L. 551, 4 Fed. Stat. An. 448-454, provided for investigations by the Interstate Commerce Commission of its own motion and upon complaint of interested parties.

Sec. 708 and Sec. 315 here in issue, when read together, as parts of the same code of official duty, in legal effect provide exactly the same as said Section 20 of the Interstate Commerce Act. Sec. 708, enacted in 1916, provided penalties for any "member" of the United States Tariff Commission, "employee, agent or clerk" thereof "to make known in any manner whatever *not procided by law \* \* \* the trade secrets or processes of any person,*" &c. Section 315 (c), enacted in 1922, directing the *Commission as such* to hold "*hearings*" in certain cases, is a subsequently enacted "manner provided by law," in the language of Sec. 708, authorizing the Tariff Commission to so make public, exactly as Sec. 20 of the Interstate Commerce Act authorizes that Commission to so make public *all* matters developed at its "*hearings.*" *In other words, the legal conspectus in both*

*cases excepts from the penalties the divulging of any information whatever its character at a "hearing" held by either commission.*

Section 15 of that Act as amended June 18, 1910, 36 Stat. L. 552, 4 Fed. Stat. An. 468, provided for "hearings," "full hearings," and "any hearing," reading as follows:

"(Sec. 15 continued. (B) NEW RATES, CLASSIFICATIONS, ETC.—FINAL DETERMINATION—EXTENSION OF SUSPENSION—HEARING ON RATES INCREASED SINCE JANUARY 1, 1910.) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either *upon complaint or upon its own initiative without complaint*, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, *but upon reasonable notice*, to enter upon a *hearing* concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after *full hearing*, whether completed before or after the rate, fare, charge, classification, regu-

lation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective. PROVIDED, That if *any such hearing* can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At *any hearing* involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the *hearing* and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. [24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. 552.]”  
(Italics ours.)

This Court in *Interstate Commerce Commission vs. Louisville & Nashville R. Co.*, 227 U. S. 88 at page 93, interpreting the meaning of the word “hearing” as used in such and similar acts, numerous citations therein in support of the text of said decision being cited, stated:

“The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported

by such information, even though not formally proved at the hearing. But *such a construction would nullify the right to a hearing*, for manifestly *there is no hearing when the party does not know what evidence is offered or considered* and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of Sec. 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body, and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14." (Italics ours.)

It will be particularly noted that the Supreme Court in that case at page 91, held, that where a "hearing"

is so provided and is not so held as to *all the data* upon which decision is based, *the order of the tribunal made without such hearing is null and void.*

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied*; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' *Tang Tun v. Edsell*, 223 U. S. 673, 681; *Chin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonaite vs. Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made; *United States v. B. & O. S. W. R. R.* 226 U. S. 14; Cf. *Atlantic C. L. v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247." (Italics ours.)

*Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 282;  
*Louisville & Nashville R. R. Co. v. Bosworth*, 209 Fed. Rep. 380-445  
*Atchison, Topeka & Santa Fe R. R. Co. v. Spiller*, 246 Fed. Rep. 16;  
*Abilene & S. R. R. Co. et al. v. U. S.*, 288 Fed. Rep. 102-110.

It is further held in said case at page 93 that any order of the Commission based upon testimony or evidence or data collected by its agents or the Commission and *not subjected to the examination by interested parties appearing is void.*

So in Oregon Railroad Co. v. Fairchild, 224 U. S. 525, this Court said:

"The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. But, as construed by the State Court, all these rights when amply secured by the statute, which declared the commission after a full hearing might require track connection.

\* \* \* It also had the right to cross-examine witnesses produced on part of the Commission and the privilege of offering evidence on every matter material to the investigation." (Italics ours.)

A very late decision by the United States Circuit Court of Appeals, *Monroe Gas Light & Fuel Co. vs. Michigan P. U. Comm.*, 292 Fed. Rep. 139-148, granting an injunction against enforcement of a gas rate prescribed by the Michigan Public Utilities Commission affirms this doctrine, stating:

"The only evidence before the Commission was the report of its own engineers, who, both as to reproduction cost and original cost, made this estimate of about 14 per cent. The only additional evidence before the court is that of the Utility's engineers, who testify that the proper allowance is about 20 per cent. If, perchance, the Commission had in mind evidence or papers in other cases, or general documents in its files which showed that 14 per cent was too high, it had no right to base its findings on such documents or evidence without calling them to the attention of

*the Utility and giving it a chance to be heard.* U. S. v. B. & O. S. W. Ry., 226 U. S. 14, 33, Sup. Ct. 5, 57 L. Ed. 104; Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91, 93, 33 Sup. Ct. 185, 57 L. Ed. 431; U. S. v. L. & N. Ry., 235 U. S. 314, 321, 35 Sup. Ct. 113, 59 L. Ed. 245."

The same doctrine was announced by this Court in the very late case decided February 18, 1924, of *St. Louis Railway Co. vs. Interstate Commerce Commission*, 264 U. S. 64. Therein was under consideration "the valuation" provisions of the Interstate Commerce Act of 1913, 37 Stat. L. 703, reading:

"If notice of protest is filed the Commission shall fix a time for *hearing* the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after *hearing* any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date hereof."

The Supreme Court in that case after reciting the technical grounds relating to the pleadings upon which affirmance of the dismissal of the petition was grounded, lest that order might be construed a decision against the legal construction claimed for the word "hearing" in that act, proceeded to affirmatively construe that word and define what thereunder "we think that the relator reasonably may demand." The court then proceeded to define the legal rights of rela-

tor by virtue of a "hearing" if properly demanded under the aforesaid statute in the following language:

"But on the other hand, since it must grant a *hearing*, manifest justice requires that the railroads should know the facts that the Commission supposes to be established, and we presume that it would desire the *grounds* of its tentative valuation to be subjected to searching tests. \* \* \* we think that, in such ways as may be found practicable, the relator should be enabled to examine and meet the *preliminary data* upon which the conclusions are found and to that end should be given further information *in advance of the hearing* sufficient to enable it to point out errors, if any there be." (Italics ours.)

It will be noted that while the petition for the writ of mandamus in that case was denied it was because of the extraordinary scope of the petition. No particular or definite items or classes of data were demanded. It sought an examination of *all* the data collected by the Commission in that *and other cases*, upon the subject in which relator was interested, *before any hearing was being held*, and, as expressly indicated by the Court "before they were offered in evidence before the Commission in any hearing."

In this case the information desired is specifically alleged as to *kind, class* and subject matter by the petition, was specifically so requested of the Commission *at the hearing* and again in writing and so denied in writing. Moreover, the Commission in this case by its answer admits it has in its possession the *precise kinds and classes of information sought* by the petition, *segregating in separate and distinct divisions the data in its possession*. As alleged in the answer

(Record page 57, Folio 86) this information was gathered by "said special experts accordingly obtained from each of the said companies *upon cost schedules framed in accordance with the accepted accounting practice* from the data on their books respecting the actual cost of production \* \* \*," and (Record page 39, folio 89), in the form of a "report or summary" of the data collected by the Commissioner's experts and adopted by the Commission for the purpose of decision in the case. The petition of Mr. Graff sought to be examined is a single special document.

In the cited case, however, it will be particularly noted that this Court took precise care not to repudiate but did affirm the rule of law previously announced by that court in *Interstate Commerce Commission vs. Louisville & Nashville R. R. Co.*, 227 U. S. 88. In other words while the petition was, for reasons relating to the form thereof in that case, denied, the court expressly and specifically laid down the precise legal amplitude of the word "hearing" exactly as contended for by appellants in *this case* and advised the Commission in that case to proceed exactly as that court ordered in the last cited case.

#### DENIAL OF "HEARING" PRESENTS JUSTICIABLE QUESTION.

That a failure to conform with the statutory procedure in such cases providing a *hearing* before any order is made by tribunals of this character presents a justiciable question and is reviewable and enforceable by the courts, was expressly decided by this Court in the late case of *Southern Pacific Co. et al. vs. Olym-*

*pian Dredging Co.*, 260 U. S. 205-210. Therein the Supreme Court said:

"The language which this Court employed in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, is pertinent: \* \* \* 'It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises can not be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, *upon notice and after hearing*, before final action is taken, *the courts can see to it that executive officers conform their action to the mode prescribed by Congress.*'"

"See also *Union Bridge Co. v. United States*, 204 U. S. 364, 385; *The Douglas*, 7 Prob. Div. (1882), 157; *Frost v. Washington County R. R. Co.*, 96 Me. 76; *Maine Water Co. v. Knickerbocker Steam Towage Co.*, 99 Me. 473; *The Plymouth*, 225 Fed. 483."

*Interstate Com. Comm. v. L. & N. R. R.*, 227 U. S. 89-91.

**MANDAMUS PROPER REMEDY WHERE AN INFERIOR TRIBUNAL PROCEEDED WITH-OUT AUTHORITY OF OR CONTRARY TO LAW.**

Where there is no other plain, speedy and adequate remedy, or no other remedy whatsoever, mandamus will lie against any court, officer, or tribunal proceeding where there is no jurisdiction or where the jurisdiction prescribed is being exceeded; or where there

is a failure to pursue a statutory procedure which is jurisdictional; or where there is a legal right given. Thus mandamus will lie against even a United States court proceeding without jurisdiction. The doctrine is concisely stated in the encyclopedia of the United States Supreme Court Reports Vol. 12, page 842, as follows:

"Mandamus will lie to compel a federal circuit court to remand a cause to the state court whence it was removed, where it is apparent as a matter of law from the record itself that the federal court was without jurisdiction. In re Winn, 213 U. S., 458, 53 L. Ed. 873, 29 S. Ct. 515.

"It is only in cases where the record makes it clear, as matter of law, that the circuit court was without jurisdiction to take any action whatever that the writ of mandamus lies." In re Winn, 213 U. S. 458, 53 L. Ed. 873, 29 S. Ct. 515.

Virginia v. Rives, 100 U. S. 413, 25 L. Ed. 667 and Virginia v. Paul, 148 U. S. 107, 37 L. Ed. 386, were approvingly cited. Ex parte Harding, 219 U. S. 363, 375, 55 L. Ed. 252, 31 S. Ct. 324.

So where an inferior court or tribunal has obtained jurisdiction but refuses to proceed in its exercise, mandamus will lie.

In Hollon Parker, Petitioner, 131 U. S. 221, at page 226:

"The right of mandamus lies, as held in *Ex parte Parker*, 120 U. S. 737, where an inferior court *refuses* to take jurisdiction when by law it ought to do so, *or where, having obtained jurisdiction, it refuses to proceed in its exercise*. It does not lie to correct alleged errors in the exercise of its judicial discretion. *Ex parte Mor-*

gan, 114 U. S. 174; Chateaugay Ore and Iron Co., Petitioner, 128 U. S. 544, 587."

The doctrine is well established that where a court refuses to take jurisdiction upon an erroneous view of the law granting such jurisdiction and dismissing an appeal, mandamus may be invoked to compel the court to take jurisdiction *and to hear and determine the case.* The authorities are set forth in State v. Taylor, 104 Southwestern, page 242, at page 247:

"This doctrine was established in the Supreme Court of the United States many years ago. In *Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 810, the Supreme Court of the United States issued a mandamus to a United States District judge to reinstate a cause which he had dismissed for want of jurisdiction, *and to proceed in the trial of the same.* In *Ex parte Parker*, 120 U. S. 737, 7 Sup. Ct. 767, 30 L. Ed. 818, the same court by writ of mandamus directed the Supreme Court of this territory to reinstate a cause which it had dismissed, because, in its judgment, it had no jurisdiction, and to proceed to *hear the same upon its merits.* The same doctrine was announced in 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123, where, in the same manner, the court commanded the Supreme Court of said territory to reinstate *and hear* a case, although the judges who had rendered the judgment of dismissal had gone out of office, and an entirely new set of judges had been installed. In *Harrington v. Holler*, 111 U. S. 796, 4 Sup. Ct. 697, 28 L. Ed. 602, the same court held directly that no appeal would lie upon a judgment of dismissal for want of jurisdiction rendered in the Supreme Court of this territory, and that the remedy, if any, was by mandamus. It will be seen from the above that the Supreme Court of the United States has from an early date

uniformly held to a different doctrine from that contended for by respondents. \* \* \* In view of these authorities, we feel bound to hold that the proper remedy, where a cause has been erroneously dismissed for want of jurisdiction, is mandamus."

The doctrine was concisely stated in Dowagiac Mfg. Co., v. M'Sherry Mfg. Co., et al, by the Circuit Court of Appeals for the Sixth Circuit, as follows:

"It will be issued when *it is not up to* or goes beyond its jurisdiction and there is no other adequate remedy." (Italics ours.)

In *Ex parte Bradley*, 7 Wallace, 74 U. S. 364, at page 377, a disbarment proceeding, the Supreme Court said:

"The ground of our decision upon this branch of the case is, that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a court can supply a defect of want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void. Now, this want of jurisdiction of the inferior court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen, from the definition and office of it, that it is issued to the inferior courts 'to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening

*their negligence and obviating their denial of justice.'* The same principle is also found stated with more fullness in Bacon's Abridgement, title 'Mandamus,' 'to restrain them (inferior courts) within their bounds, and *compel them to execute their jurisdiction*, whether such jurisdiction arises by charter, etc., being in *subsidiary justice.*' (Italics ours.)

So in *Ex parte Robinson*, 19 Wallace, 86 U. S. 505, at pages 512 and 513, the same doctrine decreed. The statute provided causes for the disbarment of attorneys. The judge proceeded without and beyond the terms of the statute. This Court said:

"There may be cases undoubtedly of such gross and outrageous conduct in open on the part of the attorney as to justify very summary proceedings for his suspension or removal from office; but even he should be heard before he is condemned. The principle that there must be citation before hearing, *and hearing or opportunity of being heard before judgment;* is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.

"That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, *where the court below has exceeded its jurisdiction in the matter,* was decided in *Ex Parte Bradley*, reported in the 7th of Wallace. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory." (Italics ours.)

Where also a legal right is accorded by the statute as in this case is accorded the right to be present, to produce evidence, and to be heard, and that right is

denied, and there is no other remedy, mandamus will issue in supervision of such proceedings to compel an inferior court or tribunal to accord such right.

In *Virginia v. Reeves*, 100 U. S. 313-329, concurring opinion by Messrs. Justice Field and Clifford, the office of mandate is thus stated:

"It is well settled that the writ of mandamus will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy. 'It issues,' says Blackstone, 'to the judges of any inferior court, commanding them *to do justice according to the powers of their office, whenever the same is delayed*. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them, *and this not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice.*' 3 Bl. Com. 110.

"It is in accordance, therefore, with the principles and usages of law that this Court should issue a mandamus in the cases here enumerated, and thus supervise the proceedings of inferior courts when there is a legal right and there is no other existing remedy." (Italics ours.)

An obiter by Judge Lacombe of the Second Circuit Court, speaking for the majority of that Court of Appeals, is precisely in point.

That a mandamus would run against the Board of General Appraisers, see *Thomas Prosser & Son v. United States*, 158 Fed. Rep. 971, at page 973, wherein it is held by the majority of the court, Lacombe, Judge, writing the opinion, as follows:

"Customs Administrative Act of June 10, 1890, c. 407, Sec. 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1935). It seems entirely clear that Congress contemplated the creation of a definite tribunal of review, to which the importer might resort, which should acquire jurisdiction of his cause when the invoice, papers, and exhibits were transmitted, and which, when jurisdiction had been acquired, should examine and decide the cause. Under the language used, the importer, in the event of that tribunal refusing *to proceed* after it had acquired jurisdiction, would be entitled to apply to the proper court for a mandamus to require the board of three General Appraisers to exercise the jurisdiction which the statute conferred upon them. This being so, a majority of this court are unable to see how another board of three to whom the papers were not in the first instance transmitted could assume jurisdiction of a cause already within the jurisdiction of the first board, which had a statutory duty to discharge with regard to it.

"For these reasons the majority hold that the decision now under review (of Board 1) was rendered without jurisdiction of the controversy, and should be vacated." (Italics ours.)

That a writ of mandamus is a proper remedy against a collector of customs to enforce any right of inspection of customs house papers which the merchant has a right to inspect, has been expressly decided.

See *United States v. Hutten*, 10 Ben. 268, 26 Fed. Cases 454.

*United States v. Young*, 28 Fed. Cases 801.

In the latter case the Court said:

"The statutes prescribing the duties of the collector in the safe keeping of custom house docu-

ments and the regulations of the treasury department made under the statute, authorizing the secretary of the treasury to prescribe rules for the government of the collector in that respect, have no relation to the production of these documents as evidence, either under subpoena duces tecum or on motion under this statute. There is nothing in the statutes of the United States withdrawing these documents from use as evidence in the courts of the United States, or even providing for the use of office copies of them in place of the originals, as in the case with papers in the executive departments."

That mandamus is the proper remedy to enforce inspection of documents in the custody of an official or tribunal for evidentiary purposes is expressly decided and ordered by the Supreme Court in

*Ex Parte Uppercu*, 239 U. S. 435.  
*Knoxville v. Water Co.*, 212 U. S. 1.

### ADEQUATE REMEDY

That any remedy afforded by protest before the Board of General Appraisers is not "adequate," seems settled.

In *Atchison, T. & S. F. Ry. Co. v. Sullivan County Treasurer, et al.*, 173 Fed. Rep., 456, at page 470, the United States Circuit Court of Appeals for the Eighth Circuit said:

"Counsel cite the statute of Colorado, which provides that the board of county commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws Colo. 1902 (Ex. Sess), p. 146, c. See. 202), and contend that the complainant has an adequate

remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.

\* \* \* An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this \$3,850 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

In Words and Phrases, Second Series, Vol. I, at page 110, adequate remedy is thus epitomized:

"The privilege, of one whose real property is levied upon under an execution against another, to make a motion in the case in which the execution was issued to release the property from such levy, does not afford him such an 'adequate remedy at law' as to cut off any right he would otherwise have to maintain injunction against the sale of the property. Gale Mfg. Co. v. Sleeper, 79 Pac. 648, 70 Kan. 806."

The decision of the Court of Appeals should be reversed and the demurrer sustained.

**IMPORTANCE OF THIS PROCEEDING:**

The importance of this proceeding, which is the first here, presenting questions of legal construction of the "Flexible Tariff," was expressed by the estimate of that act by the late President Harding made upon signing the same as follows:

"The bill was long in making, but if we succeed, as I hope we will succeed, in making effective the elastic provisions of the measure, it will make the greatest contribution toward progress in tariff-making in the Nation's History."

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1926

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No. 91

THE UNITED STATES OF AMERICA EX REL. NORWEGIAN  
NITROGEN PRODUCTS CO., INC., *Plaintiff in Error.*

vs.

THE UNITED STATES TARIFF COMMISSION, THOMAS O.  
MARVIN, WILLIAM S. CULBERTSON, *et al.*

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA

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## REPLY BRIEF FOR PLAINTIFF IN ERROR

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### The Price of the Right to Be Heard.

The attention of the Court is invited to the statement in the brief for the Defendant in Error, at page 12, and elsewhere in substance, as follows:

"The Norwegian Company, for whom relator acts, declined to furnish the Commission any information respecting its production costs, because it considers such matters confidential business secrets not to be divulged without injury."

That position was never taken and the record nowhere shows that the Norwegian company declined to produce evidence of its production costs "because it considers such matters confidential business secrets not to be divulged without injury."

The truth of this matter, fairly inferable from the record, is that counsel for relator believed the *prima facie* case made by petitioner so vulnerable that by cross-examination and disproof it could be demolished. When, however, counsel so proceeded, he was almost continually denied any and all rights to be heard or any reasonable continuance without first promising to produce costs of the foreign corporation. Deeming such demands unwarranted by law and knowing such not necessary to the performance of the Commission's duties, counsel declined this unwarranted demand for his client's legal rights before the Commission. In that status he had no other recourse than to stand upon what he deemed the law of the case.

Nor does the record show that Plaintiff in Error, relator, is interested solely for the foreign Norwegian company. On the contrary, the record discloses that the relator herein is not a foreign corporation, but the Norwegian Nitrogen Products Company, a corporation, organized under the laws of the State of New York, engaged in the business of importing nitrite into the United States (R. 50, 51). The record discloses (R. 50) that the relator's business consists of "selling on commission." There is not a thing in this record

showing that the domestic corporation had any knowledge of or power to produce evidence of the costs of production of nitrite by the foreign corporation. It does show a personal interest in relator in the rate of duty laid upon imported nitrite. There is not, therefore, any justification in this record, were there in the law, for visiting such penalties upon the Norwegian Nitrogen Products Company of New York, were there such as to the foreign corporation, which there is not, for alleged failure on the part of the foreign corporation to show its books or produce proofs of its costs.

Moreover, bearing in mind that nitrite is a basic material for azo dyes, that azo dyes are used in the dyeing of household goods and wearing apparel which are used in every home in the United States, and that this proceeding contemplates the increase of the rate of duty thereupon when imported into the United States 50 per centum, the interest of the consuming public or "public interest," which, by direction of the President, the Commission is to ascertain in this proceeding, at once becomes apparent.

The uniform rule of law in such cases is well expressed in the case of *United States ex rel. Masslich vs. Saunders*, 124 Fed. Rep. 124, at page 126, wherein the United States Circuit Court of Appeals for the Eighth Circuit, opinion by Mr. Justice Sanford, concurred in by Mr. Justice Van Devanter, succinctly epitomizes the doctrine as follows:

"Whatever public officers are *empowered* to do for the benefit of private citizens the law *makes it their duty* to perform whenever public interest or individual rights call for the performance of that duty. *Supervisors vs. United*

States, 4 Wall. 435, 446, 18 L. Ed. 419; City of Little Rock vs. United States, 103 Fed. 418, 424, 43 C. C. A. 261, 267."

Applying that well settled principle of law to the quoted provision of Section 315 (c), empowering this relator to exercise the rights therein provided for its benefit, in this situation, where there is also a public interest affected, "it makes it the duty" of the Commission to fully accord this relator these rights not only because of and in response to its personal interest, but also because of and in response to the identical interest of the consuming public of the United States. This appellant stood in this proceeding before the Commission as one not only speaking for itself at its own expense, but also speaking for the great consuming public of the United States without the slightest expense to them, but wholly and entirely at its own expense.

Whatever may have been the sins of the foreign corporation, any which we deny, the Commission, granting its legal right, which we deny, should not in law or morals have visited the same upon the blameless domestic corporation, and tremendously interested innocent consumers.

The law probably provides a drastic remedy in the Commission to enforce the production of evidence, including costs of production, by a foreign corporation. The Commission, acting in conjunction with and through the Secretary of the Treasury, as by law required, Section 318, subdivision (c), and Section 510, of the Tariff Act of 1922, can, until such information when duly demanded is produced, deny a foreign corporation the right to import into the United States any merchandise.

There is nowhere in the statutes the rule of law here asserted by the defendant that such a foreign corporation shall be denied the right "to be heard" before the United States Tariff Commission, or be denied any of the rights provided by Section 315, until it produces its production costs. Such action by the Commission had no foundation of law and was an unwarranted assumption of authority prescribing an added penalty to that already by Congress provided.

**The Rules of the Commission Granted Relator's Demands. Any Contrary Rule Would Be Illegal and Void as Contravening the Statute.**

The Government in its brief justifies the action of the Commission in denying the relator an inspection of the record before it upon which the Commission was proceeding to act, and its other requests as charged in the petition herein, upon the ground that the Commission had by rule provided that *all of its data* as to costs of production may be regarded as confidential, and that the Commission is the sole and final judge of the legality of its own rules. (Brief for Defendant in Error, pp. 21 and 22.)

The right of interested parties to a hearing herein is granted by statute. Any rule or regulation promulgated by the Commission which limits that right beyond the full statutory grant, it seems trite to say, is without authority of law and therefore void. *Morrill vs. Jones* (106 U. S. 466.) The decision of the question, therefore, must be determined by the language of the statute and not by the language of some letter or letters written by the Commission, or, if you please, alleged regulations or letters which circumscribe or limit the language of the statute.

The Commission has no legal power by letter or regulation to barter away the rights of interested parties secured by statute in supinely trafficking for cost data. The Act supplies the Commission with plenary powers to compel production of that data from all domestic manufacturers necessary for the performance of their statutory duties. The puerile excuse, therefore, made to this court that otherwise it cannot function is an assertion of an impotence not attributable to the law.

**Relator was Afforded no Reasonable Time to Secure Evidence and was Denied Rights Provided by the Regulation of the Commission and the Statute.**

The only *regulation* affecting the situation, in accord with the law, and the one upon which the relator here relies, is that of the Commission (R. 73) which provides that

"parties who have entered appearances shall, prior to filing of briefs, have opportunity to examine the *report* of the Commissioner or investigator in charge of the investigation *and also the record*, except such portions as relate to trade secrets and processes."

The summary of information or report herein submitted relator was under date line of September 15, 1923. It was submitted by the Commision as "part of the public hearing of September 10, 1923." While it was so entitled and made so to appear, it was not in fact a part of that hearing, for it was not presented to nor seen by the relator until September 16, 1923, six days after the conclusion of the hearing of September 10, 1923.

Counsel for appellants upon receipt of the aforesaid "summary" and at the adjourned hearing of the Commission on September 26th, appeared thereat and requested thirty days in which to collect evidence from Norway and Seattle in refutation of said summary which had for the first time been delivered appellant on September 16th preceding. The Commission declined to allow that length of time and summarily set down the next hearing thereof upon the subject-matter for October 6th. *It was in that status and after due exception being at every point entered to the refusal of the Commission to grant a longer time to appellant to gather and produce such evidence, that counsel for appellant consented to do the best he could within the time limited* and with his brief filed such information as was within that inordinately short time possible. In other words, counsel for appellant with due diligence afforded the Commission all evidence possible within the limited time allowed nevertheless excepting to the Commission's refusal to grant a longer period of time to produce plenary evidence in disputation of their summary.

Moreover, the public document upon which defendant herein relies to sustain the claim that the issue is moot, discloses that the final summary report to the Commission, that upon which it predicated its report to the President, was dated October 29, 1923, twenty-three days after the case was closed! The relator was at no time permitted to inspect the whole or any part of the data gathered by the Commission, the whole or any part of the record upon which it predicated its findings or decision, and this in direct violation of and contrary to the only valid rule promulgated by the

Commission upon the subject-matter which provides that right.

**The Proceedings of the United States Tariff Commission Under the Flexible Tariff are Legislative in Character, the Statute Requiring Therein Decisions of Both Questions of Law and Fact. Its Determinations of Law Issues Therein Present Justiciable Questions and are Reviewable by the Courts.**

At page 19 of the brief by Defendant in Error, it is stated:

"The misconception underlying the relator's entire argument is that it has some property right which entitles it to a hearing and the deprivation of which would deny it due process of law. No importer and no American manufacturer has any right of property affected by a change in tariff. Such changes may destroy a business without infringing any right. The hearings before the Tariff Commission are not judicial inquiries. (Prentis vs. Atlantic Coast Line, 211 U. S., 210-226)."

It is not claimed by relator that the proceedings before the Tariff Commission are judicial. It is not claimed that there is a right of property to import merchandise into the United States. It is well settled by a long line of decisions that these proceedings are legislative. It is equally well settled that any and all questions of law decided by the Commission in such proceedings are the subjects of review by the courts. It is likewise equally well settled that in the performance of a delegated legislative function any board or

commission must *pursue* the law strictly. It at least must *pursue* the law, and any lack of such pursuit renders the proceedings and subsequent order based thereupon void.

The Tariff Commission in these proceedings is by law an arm of the President. An investigation by that Commission is jurisdictional to the right of the President to proclaim a change in the rate of duties. The statute co-ordinates their duties. By the only rule or direction made by the President (R. 17) here applicable the Commission is directed to make "*such investigations as shall be in accordance with the law and the public interests*". That law requires that interested parties appearing shall at a "*public hearing*" be given the right "*to be present, to present evidence and to be heard*". Until such is had there is no investigation in accordance with law, the President's order, or the granted authority.

If the contention of the Government in this case is upheld, that the Commission need grant only such hearings as it sees fit, or shall permit inspection of only such data gathered as it shall see fit, regardless of whether or not trade secrets, then this provision is read out of the statute. It vests no *rights* in interested parties appearing.

Regardless of what may be the class of these proceedings, judicial, legislative, or administrative, it is the contention of the relator that while one has no absolute right to import property, nevertheless, so long as Congress has granted this right of importation upon the payment of certain duties fixed under certain prescribed procedure, an importer has the right to contest any levy of that tax upon his property when imported

as not laid in accordance with the law. Whether or not the statute has been followed is always a justiciable question. That has not only been settled by the courts in all rate-making cases, but in an identical line of cases with this, to wit, appraisement cases.

The position of the Commision in its answer herein, and of Government in its brief, that the rulings of law and the regulations promulgated by the Commission are final and conclusive upon all the world, is a position time and again repudiated by this Court and makes this Commission regally omnipotent and supreme in its findings.

Proceedings of Congress in laying an import tax are reviewable by the courts upon the question, did Congress pursue the law (Constitution) in so enacting. (Field vs. Clark, 143 U. S., 649.) The proceedings of the Secretary of the Treasury fixing standards for the importation and embargo upon imports are so reviewable. (Buffield vs. Shanahan, 192 U. S., 470.) Such legal decisions of the President are also reviewable. (U. S. vs. Midwest Oil Co., 236 U. S., 459, 468.) Precisely here pertinent is Passavant vs. U. S., (148 U. S., 214), wherein this court held that a finding by the Board of General Appraisers as to market value (and cost of production) *made final by statute, for the ascertainment of duties laid by Congress*, was reviewable by the courts upon the questions of whether or not the board *pursued the law in so finding*.

By the flexible tariff, Congress lays the duty in a state of facts and delegates ascertainment of those facts to the President, necessarily assisted by the Tariff Commission. That delegation defines the statutory method of procedure. Can it be possible that

this Commission can not be reviewed by the courts as to its legal decisions, whereas Congress, the President, and all other officials may? Can it be possible that this Commission can by regulation or letter disregard the statute, ignore the statutory rights of interested parties, and become supreme judge of its own acts and procedure?

Illustration of the exercise of this doctrine by this Court is had in the case of *Knoxville v. Water Co.*, 212 U. S., 1. The statement of the case is had at page 6 as follows:

"This is an appeal by the City of Knoxville from a decree of the Circuit Court of the United States for the Eastern District of Tennessee. The appellee is a public service corporation, chartered for, and engaged in, the business of supplying that city and its inhabitants with water for domestic and other uses. The cause in which the decree was rendered is a suit in equity which was brought by the company on December 7, 1901, against the city *to restrain the enforcement* of a city ordinance fixing in detail the maximum rates to be charged by the company. This ordinance was enacted on March 30, 1901."

The character of the proceedings is defined by the court at page 8, as follows:

"The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of rate-making is *purely legislative in its character*, and this is

*true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated.* The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis v. Southern Railway Co., 211 U. S. 210; Honolulu Transit Co. v. Hawaii, 211 U. S. 282.*"

The court thereupon proceeds to examine in detail the evidence submitted by the public service corporation to the city counsel as a proper appraisement of its property. This consisted of various facts and items deemed by the service corporation to legally constitute a due appraisement of its property, *competent evidence*. In the proceeding the city counsel took into consideration certain items and excluded other items, as not legally entering into due appraisement. This Court in reviewing all of these items at page 15, declared:

"It follows from what has been said that the judgment of the court below cannot stand. There was error in the appraisement of the present value of the plant, in the deduction of the reductions made by the ordinance, and in the *exclusion of evidence relating to the operations of the company after the enactment of the ordinance.*"

This case is but typical of many others wherein the determination of a rate or other fact is committed to the administrative tribunal involving also legal questions as to *what is and what is not legal evidence or legal items in that determination.* In all such cases the courts uniformly have held, that every decision of law

made by such officers or tribunals as to whether certain items are legally included and certain items are not legally included, is reviewable by the courts.

Of course, exactly within this principle is the exclusion of evidence and the denial of the statutory right to be heard upon certain evidence in the record.

It will be particularly noted that these reviews have been had by extraordinary proceedings. The proceedings in the particular cases were by injunction, the rate having already been declared. If the rate had not already been declared, but as in the present case, the commission or tribunal had refused to follow the law in the according of a legal right, and the same were not reviewable as in this case, mandamus would apply. In truth and in fact, it has uniformly been held that mandamus is the correlative remedy of injunction. While the former is a proceeding at law and the latter a proceeding in equity, nevertheless, the results sought to be accomplished in each are the same, depending upon whether the act or acts complained of are refused of performance or are performed.

Thus in *Noble vs. Union River Logging Railroad*, 147 U. S., 165, at page 171, it is stated:

"We have no doubt the principle of these decisions applies to a case where it is contended that the act of the head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of*

Liquidation v. McComb, 92 U. S., 531, 541: 'But it has been well settled that when a plain official duty requiring no exercise of discretion, is to be performed, and performance is refused, *any person* who will sustain *personal* injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other.'

That a failure to conform with the statutory procedure in such cases providing a *hearing* before any order is made by tribunals of this character presents a justiciable question and is reviewable and enforceable by the courts was expressly decided by this Court in the late case of *Southern Pacific Co. et al. vs. Olympian Dredging Co.*, 260 U. S. 205-210. Therein the Court said:

"The language which this Court employed in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, is pertinent: \* \* \* 'It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, *upon notice and after hearing*, before final action is taken, *the courts can see to it that executive officers conform their action to the mode prescribed by Congress.*'"

"See also *Union Bridge Co. v. United States*, 204 U. S. 364, 385; *The Douglas*, 7 Prob. Div.

[1882], 157; Frost v. Washington County R. R. Co., 96 Me. 76; Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473; The Plymouth, 225 Fed. 483."

The fact that the powers vested in the President of the United States to ascertain and proclaim cost of production, Section 315, are identical with the powers which, for more than a century, have been delegated to appraising officers of the United States, should ever be borne in mind. The "cost of production," the finding of which has been delegated to appraising officers by Congress, is determinative of one of the factors of import duties laid, to wit, the *basis* thereof, fixing its amount, while the power delegated to the President under Section 315, to find cost of production, is determinative of the *rate* of duty to be applied to the basis thereof in a like manner to fix the amount by the appraising officers. Accordingly, the legal construction of Section 315 is aided by the great volume of decisions rendered by this Court and other Courts having jurisdiction of the subject matter construing these powers of appraising officers.

It has long been the well settled rule of statutory construction that the statutory procedure prescribed for appraising officers in the ascertainment of "market value" and "cost of production" is jurisdictional. "The mode is the measure of the power." Whenever an appraising officer, therefore, fails to *pursue* the statute or to perform all of the requirements of the statute as prescribed, jurisdiction in the premises ceases and, thereafter, his proceedings are null and void.

That a determination by an appraiser or Board of General Appraisers of a question of law in the course

of their proceedings in the determination of market value, *including cost of production*, is reviewable by the courts, is well settled.

In Arthur vs. Goddard, 96 U. S., 145, 147, this Court held that the inclusion of a discount as part of market value by appraising officers was shown by the record to be a decision of a question of law and therefore reviewable by the courts. The court at page 147 said:

“In this case, the appraisers did not profess to appraise or ascertain the market value of the goods. They simply gave a construction to the invoice; they decided *its legal effect* to be that 8,670.25 francs is there declared to be the market value of the goods. They held as a legal proposition, that, in fixing the value, the discount of two per cent should not be allowed; and, as a result of this, that 8,670.25 francs, and not 8,494.95 francs, was the value.”

That where an appraiser or a Board of General Appraisers “has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute” all such errors in law are reviewable by the courts has long since been well settled. The question here was the decision of the appraisers to include in market value the bonification or exportation tax laid by Germany. Thus in United States vs. Passavant, 169 U. S., 16, at page 20 the Supreme Court said:

“And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector *has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute*. Oberteuffer v. Robertson, 116 U. S. 499; Badger v. Cusimano, 130 U. S. 39; Robertson v. Frank Brothers Company, 132 U. S. 17; Erhardt v. Schroeder, 155 U. S. 124; Muser v. Magone, 155 U. S. 240.

" \* \* \* Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, *was a question of law*, and properly carried to the board of general appraisers by protest and appeal."

In *Robertson vs. Frank Brothers*, 132 U. S. 17, the appraiser added an *estimated value* to the invoice for shipping charges and labor connected therewith on certain bananas for the shipping of them *into* Aspinwall. The question was whether *actual* shipping charges or *estimated* shipping charges was a rule prescribed by the law in such cases. The point was raised that the appraisement was not open to impeachment by the courts. This Court in that case said at page 24:

"But it is contended that the act of the *appraiser* in making, or requiring to be made, the *additional charges for transportation and labor* was final and conclusive, and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that *if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear*, his appraisement is not unimpeachable. *This qualification applies to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like.*"

The court held the appraisement illegal for the reasons stated and affirmed the right of the court to review these questions of law as decided by the appraising officers.

In Muser vs. Magone, 155 U. S., 240, at page 246, the Supreme Court thus stated the rule:

"The conclusiveness of the valuation of imported merchandise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. Hilton v. Merritt, 110 U. S. 97; Auffmordt v. Hedden, 137 U. S. 310; Passavant v. United States, 148 U. S. 214. • • •

"Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it, as where the appraisers are disqualified from acting; or have not examined the goods; or *illegal items have been added independent of the value*. The principle applied in such cases is analogous to that by which *proceedings of a judicial nature* are held *invalid* because of the absence of some strictly jurisdictional fact, or facts, essential to their validity."

Bearing in mind that the appraisers perform precisely the same legal functions here performed by the Commission, to wit, ascertain under prescribed statutory rules certain facts *including cost of production* in ascertainment of a tax laid by Congress, we here have numerous adjudications that failure of the Commission to follow the law prescribing its method of procedure presents a justiciable question and renders its findings and decisions null and void. The Commission here having failed to follow the law by not permitting inter-

ested parties appearing "to be heard" has not as yet complied with the law or order of the President to investigate *in accordance with the law*. Jurisdiction still resides in the Commission to make an investigation *in accordance with the law*, whereupon, by virtue of Section 315 (c), the President is empowered to make a new proclamation accordingly. It follows that the previous proclamation of the President is null and void, the law authorizing the same not having been pursued and all protested duties thereunder must be refunded.

**The Writ was Denied Below upon the Merits and not  
in Exercise of a Sound Discretion.**

This writ was not denied by either of the courts below in the exercise of a sound discretion. The record shows that the judges of both courts gave careful and studious attention to the issues presented and rendered judgment not in the exercise of the discretion to dismiss the proceedings but upon the merits. Indeed, the opinion of the Court of Appeals below, by Mr. Justice Smith (R. 93-100) is a complete and conclusive answer to every proposition asserted by the Government in demands of relator. It would seem inconceivable, in view of the very great importance of this proceeding, that this Honorable Court, maintaining such a splendid record for the speedy disposition of federal litigation, would dismiss this writ in the exercise of a sound discretion, thereby long delaying final adjudication not only as to the constitutionality of the flexible tariff but also as to the due and legal procedure of that Commission, sitting daily, hearing numerous applications, making investigations in every civilized country, and consuming and expending of the public funds vast

sums each year. It is respectfully submitted that this Honorable Court under the circumstances will be desirous of considering all the points upon the merits by this record presented.

Indeed, in view of the language of the proclamation of the President made in this case, which said proclamation unquestionably, as is the usual course, was prepared by the Tariff Commission and submitted to the President for signature, therein finding and reciting

"Whereas, in the course of said investigation, a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard";

there is a serious question whether or not that finding by the President does not, by any possible other procedure than this, deny relator a remedy to test the accuracy of the procedure of the Tariff Commission in this and similar cases.

### **Conclusion**

It seems to have suited the purposes of the Government in its brief to magnify the duties imposed by the Act of 1916, and to minimize the new and important duties imposed upon the Commission by Section 315 (c) Tariff Act of 1922. The duties imposed upon the United States Tariff Commission by the Act of 1916, required of them only to make the investigations and to report the same to the Congress. Thereafter these might and might not be read. Thereafter these might and might not be made the basis of tariff legislation.

It so happens, it should in justice to the Commission be said, that many if not all of these reports were works of great diligence, thoroughness and value, and afforded an inestimable contribution to the cause of tariff-making by the Congress of the United States. No doubt that in a great measure contributed to the fact that the Congress, by the Tariff Act of 1922, Section 315 the Flexible Tariff, confided to the United States Tariff Commission the duty of making investigations and reporting to the President upon all such subjects as a condition precedent to his right to the exercise of the great power, the greatest power ever conferred upon a President of the United States, to fix the rates of import duties.

A comparison, however, of the duties performed by the United States Tariff Commision under the Act of 1916, with those to be performed under the Flexible Tariff, Section 315, is as a comparison of a mole hill to a mountain. The visible fact of the great expansion of the quarters occupied by that Commission, of the increased force of clerks and experts, of the provision of an extensive and needed hearing room, and of their magnified importance in the daily press, not to speak of the tremendous importance of the duty itself, all contribute to the increased importance of the work of this Commission had by the Flexible Tariff over and above their earlier duties. Said commission thereby, in fact, became the substitute for the Congress of the United States in the performance of the important constitutional function of the determination of the appropriate rates of our import duties levied by Congress instead of a mere agency of the Committees of Congress in the gathering of information.

Now the inference with which the Government seeks to impress the court by argument is, that the words in the Flexible Tariff, Section 315 (c) requiring the Commission in the exercise of these new and important functions to hold "public hearings" and to accord the right of interested parties "to be present, to produce evidence and to be heard" is of such minor consequence that they can be regarded or disregarded in the discretion of the Commission, and, that they add nothing to the powers possessed by the Commission under the Act of 1916.

Nothing could be further from the real purpose and spirit of this legislation. Certain important factors in the Congress were unwilling to entrust to either the President or the United States Tariff Commission or any other tribunal or official this important function without it being attended with the right of interested parties to appear and to be heard and the statutory assurance that these proceedings and determinations would not be secret, behind closed doors and away from public scrutiny, as had been claimed, was the case with the Committees of Congress. *This particular provision was inserted as the key provision insuring that purpose of the Congress.* It was the one provision inserted to insure that our tariff rates would be established not upon the back-door requests of politicians, upon unverified letters of contributors to political purposes, but upon *legal evidence adduced under oath* before a non-partisan commission, thoroughly sifted, analyzed and if necessary disputed by talent informed of the facts and thus enabled to thus contribute to the truth in these investigations. That is not only the letter, but it is the spirit of this enactment of the Con-

gress. Anything short of that or any interpretation by any court less than that falls short of the letter and the purpose of Congress.

Respectfully submitted,

**MARION DE VRIES,**

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*Attorneys for Plaintiff in Error.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1926

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No. 91

THE UNITED STATES OF AMERICA EX REL. NORWEGIAN  
Nitrogen Products Co., Inc., Plaintiff in error,

v.

THE UNITED STATES TARIFF COMMISSION, THOMAS  
O. Marvin, William S. Culbertson, et al.

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*IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT  
OF COLUMBIA*

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## BRIEF FOR THE DEFENDANT IN ERROR

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### OPINIONS BELOW

The opinion of the Supreme Court of the District (R. 78) is not reported. The opinion of the Court of Appeals of the District (R. 93) is reported in 6 F. (2d) 491, and in 55 App. D. C. 366.

### JURISDICTION

The judgment of the Court of Appeals to be reviewed was rendered April 6, 1925. (R. 101.) The petition for writ of error was filed and allowed April 24, 1925. (R. 101, 105.) Although the plain-

(1)

tiff in error does not assert it, jurisdiction of this Court to review the judgment below upon writ of error seems to exist under Paragraph Sixth of Section 250 of the Judicial Code, as it stood prior to the Act of February 13, 1925, and which authorized review by this Court of final judgments of the Court of Appeals of the District upon writ of error.

In cases in which the construction of any law of the United States is drawn in question by the defendant,

as the Tariff Commission, in its answer to the petition for writ of mandamus drew in question the construction of Section 708 of the Revenue Act of September 8, 1916 (c. 463, 39 Stat. 756, 798), which forbids the Tariff Commission to make known trade secrets or processes disclosed to the Commission. (*Santa Fe Pac. R. R. Co. v. Work*, 267 U. S. 511; *Brady v. Work*, 263 U. S. 435, 437; *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117.) Unless this paragraph of Section 250 of the Judicial Code authorizes this Court to take jurisdiction, it has none.

The plaintiff in error asserts that the jurisdiction of this Court exists because the case is one involving the construction or application of the Constitution of the United States or the constitutionality of a law of the United States within the meaning of paragraph Third of Section 250. (Brief of plaintiff in error, pp. 25-40.)

No constitutional question of any substance is presented. Plaintiff in error contends that a con-

stitutional question is involved because it is seeking to enforce a right to be heard before the Tariff Commission, given by Section 315(c) of the Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, 942. It asserts that a constitutional question as to the validity of the statute is involved in the case, although its validity is not drawn in question by either party, because the plaintiff in error has no right to be enforced, if the statute be invalid. By the same reasoning, every case in which a plaintiff seeks to enforce a right alleged to be given by a statute of the United States raises a constitutional question.

The other constitutional question claimed by the plaintiff in error to be found in the case is that, in denying to it a hearing as prescribed by the Tariff Act, the plaintiff's property was taken without due process of law. This contention proceeds on the basis that the raising or lowering of a duty on imports may not be effected without giving to importers a hearing amounting to due process under the Fifth Amendment and that, although the right to a hearing is purely statutory, its deprivation becomes a violation of the Constitution. This contention has no more substance than the other.

#### **QUESTION PRESENTED**

The Tariff Act of 1922 directs the Tariff Commission to investigate costs of production at home and abroad for the purpose of making reports to the President to assist him in adjusting the tariff

to equalize differences in such cost, and provides that the Commission in the course of its investigations, shall conduct public hearings and allow interested parties a reasonable opportunity "to be present, to introduce evidence, and to be heard" and authorizes the Commission to adopt "such reasonable procedure, rules, and regulations as it may deem necessary." The principal question presented here is whether the refusal of the Commission to disclose to a foreign manufacturer and importer information as to production costs of American manufacturers, acquired by the Commission from inspection of the books of such concerns, under a rule and pledge that the information shall not be made public, denies to the foreign manufacturer and importer the reasonable opportunity to be heard, given by the statute, particularly in a case where the foreign concern has refused to divulge to the Commission its production costs.

At the outset the question arises whether the case has become moot because the investigation has been finished, and the Commission's report has been made to the President, who has reached a decision and fixed the tariff accordingly, and has not requested further assistance from the Commission.

#### **STATUTES AND REGULATIONS INVOLVED**

The two Acts directly applicable are Sections 700 to 708, inclusive, of the Revenue Act of September 8, 1916 (c. 463, 39 Stat. 756), which provide for the creation of the Tariff Commission to investigate matters relating to the tariff on imports and

putting its information at the disposal of the President and the Committee on Ways and Means of the House of Representatives, and Sections 315 to 318, Title III, of the Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, which authorize the President to determine differences in cost of production at home and abroad and to modify the tariff duties accordingly, and, in that connection, authorize the Tariff Commission, in order to assist the President in performing this duty, to make investigations and report the result thereof to the President. These statutes are printed at length in the appendix.

The rules and regulations adopted by the Commission are printed in the record, at page 71.

#### STATEMENT

The Norwegian Nitrogen Products Company, a New York corporation, filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus (R. 3), directed to the United States Tariff Commission and its members, praying that the writ issue to compel the Commission to disclose to the Norwegian Company certain information which the Commission had obtained respecting the cost of production of nitrites by American manufacturers. (R. 14.) The Commission interposed an answer (R. 50), the plaintiff in error demurred to it (R. 77), the demurrer was overruled by the Supreme Court of the District, and as the Norwegian Company stood on its demurrer judgment was

entered dismissing the petition (R. 88). The Supreme Court of the District held that the Commission was right in not disclosing the information asked for. (R. 78.)

On writ of error the Court of Appeals held that the information should have been given to the plaintiff in error, but that the case before reaching the Court of Appeals had become moot, since the hearings before the Tariff Commission had been completed, its report furnished to the President, and the President had reached his decision and made an order fixing the tariff rates on nitrites. (R. 93-100.)

The allegations in the answer demurred to must be accepted as true, and this statement is based on them and on admissions in the petition for the writ.

Under date of March 27, 1923 (R. 52), the Tariff Commission made an order that, for the purpose of assisting the President in the exercise of the powers vested in him by the Tariff Act of 1922, an investigation should be made of the differences in cost of production of sodium nitrite at home and abroad. It ordered that a hearing be had at some date to be thereafter fixed.

Meanwhile the Commission proceeded with the investigation. Experts in its service proceeded to Norway for the purpose of obtaining from the Norwegian Hydro-Electric Nitrogen Corporation, at Christiania, the sole company manufacturing sodium nitrite in Norway, data from its books relating

to the Norwegian cost of production. (R. 58.) The plaintiff in error is the exclusive selling agent of the Norwegian manufacturer, and in its appearance before the Tariff Commission and in the court acted for and on behalf of the Norwegian manufacturer. (R. 50-51.) The Norwegian Company refused to divulge its costs of production or allow the Commission access to its records. (R. 37-39, 41, 58.) Like information requested from the German manufacturers was refused to the Commission. (R. 59.) The Commission's experts were given access to the books of original entry of the American manufacturers and obtained from these original sources all the data required to ascertain the cost of production by American companies. (R. 32, 54, 57.) This information was divulged by the American companies not under subpoena, but under an agreement with the Commission that the information should be treated as confidential and after a declaration by the Commission that its rules required that the information furnished as to production costs should be treated as confidential. (R. 22, 57, 58.)

Section 708 of the Revenue Act of September 8, 1916, prohibited the Commission from divulging trade secrets or processes of which it acquired information in its investigations.

The rules of the Commission provide (R. 73):

Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commis-

sioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes.

Whatever may be the meaning of the words "trade secrets and processes," as used in the statute, the Commission has uniformly treated those words as including confidential information respecting production costs. It used the words in that sense in its rules, and it was "recited in the forms and schedules of the Commission, that the costs of individual persons, firms, or corporations would be held strictly confidential and were for the exclusive use of the Commission and would be published only in such manner as would not divulge the operations of individual manufacturers." (R. 58.) After making its investigations, the Commission ordered a public hearing, to be held September 10, 1923. (R. 6.) At that hearing the relator appeared by counsel and attempted to cross-examine the president of the American Nitrogen Products Company as to his costs of production, but the Commission sustained the witness in his refusal to reveal such costs. (R. 60, 61.) The relator also requested that it be supplied with a complete copy of an application of the American Nitrogen Products Company for an increase in the rate of tariff on sodium nitrite. (R. 61.) The Commission disclosed only a copy of the application from which a statement of the costs of

production of the American Company had been eliminated.

On September 15, 1923, the Commission made public a report, or summary of information, in which were stated the results of the investigations which had been made by its experts, except that the costs of production of the American companies was not given. (R. 61-63.) The information in the possession of the Commission respecting costs of production in Norway were contained in the summary, and the cost of production as determined from the public sources available to it in Norway was stated. This summary was a complete review of everything in the possession of the Commission except the costs of production of the American companies. It has been the custom of the Commission to publish costs of production in the form of averages covering the operations of many concerns, so as not to reveal individual production costs, but, on account of the limited number of companies producing nitrites in America, "said production costs could not be stated in the form of averages without revealing in substance and effect the individual production costs." (R. 59.)

Hearings were resumed September 26, 1923. The relator challenged the estimates as to cost of production in Norway but declined to present any cost of production in its Norwegian factory. (R. 62.) Being pressed on that matter by the Commission, the relator produced a telegram from the Norwegian Company saying (R. 37) :

Tariff Commission estimate cost production completely erroneous. Cost production by far surpasses their estimate. Stop. On principle we always refuse publish cost price. Consequently did not furnish investigators any information enabling them calculate cost price. Stop. We thus strongly contest investigators' competence.

The relator frankly insisted that it could not be compelled to produce information respecting the Norwegian costs, but nevertheless was entitled to a disclosure of all the information respecting American costs, saying (R. 62) :

We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data.

The relator made several formal requests for permission to inspect data that had been gathered by the Commission's experts concerning costs of production and for opportunity to cross-examine those experts as to testimony they had presented to the Commission. (R. 63, 64.) The Commission ruled that the relator might offer such evidence as it chose, but that it could not be allowed the privilege to cross-examine the Commission's field examiners

and field experts, and that it might not inspect the original and primary data collected by the Commissioner's field examiners respecting cost of production.

Thereafter, the hearings were completed. The relator filed a printed brief with the Commission (R. 65) in addition to argument upon the law and the facts disclosed at the hearing.

The petition for mandamus was filed December 12, 1923 (R. 2), and, after the relator stood on its demurrer to the answer, the petition was dismissed April 28, 1924. (R. 88.) After the judgment was entered in the Supreme Court dismissing the petition for mandamus, the Commission completed and submitted to the President its report, and on May 6, 1924, the President issued his Proclamation reciting the investigation made by the Commission and fixing the duty necessary to equalize costs of production.

#### **SUMMARY OF ARGUMENT**

I. The case is moot. The Commission has completed its investigation and the President has announced his decision. Irregularity in the proceedings of the Commission does not affect the validity of the President's Proclamation. The Commission is under no legal duty to make or renew an investigation relating to equalization of differences in cost of production, except when requested by the President. Since the President has not made such a request, the courts may not com-

pel the Commission to reconsider the matter or make a new report, and the disclosure of the information desired by relator would now be futile and the relief sought unavailing.

II. Mandamus is not a writ of right. It issues to remedy a wrong and not to promote one, and will not be granted to those whose conduct has been such as to render it inequitable to grant them such relief.

The Norwegian Company, for whom relator acts, declined to furnish the Commission any information respecting its production costs, because it considers such matters confidential business secrets not to be divulged without injury. Having taken that position, it would be inequitable to compel the Commission to disclose to foreign competitors like confidential information as to costs of production of American companies, especially as the information was furnished voluntarily on promise that it would be treated as confidential.

III. The right to a hearing before the Commission rests on the statute and is not a constitutional right. No importer has any right affected by tariff changes entitling him to a hearing on proposed changes, unless granted by statute. The hearings before the Commission are not judicial or quasi-judicial, or anything more than statistical inquiries. The provision in Section 315(e) of the Tariff Act of 1922 that the Commission shall give reasonable opportunity to parties interested to be

present, to produce evidence, and to be heard, should not be construed to require the Commission to grant a hearing in the sense of a judicial hearing, with the right to cross-examine witnesses and to have all evidence in the possession of the Commission disclosed. The hearing intended is one like the usual hearing before legislative committees. So construed, the party is not denied a reasonable opportunity to be heard because the Commission declines to disclose confidential information respecting costs of production obtained under promise of secrecy and which the Commission itself has verified by complete examination of the records and books and accounts of the companies in question. Any other construction of the statute would defeat the purpose of the Act.

**ARGUMENT****I****THIS CASE IS MOOT**

It is settled that if a case has reached a stage where it is impossible for the court, if it should decide the case in favor of the plaintiff to grant him any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal. (*Brownlow v. Schwartz*, 261 U. S. 216; *Mills v. Green*, 159 U. S. 651, 653.) The relief sought in this case was to compel the Tariff Commission, in the course of its investigation preliminary to its report to the President on production costs of nitrates,

to permit the relator to examine the data on file with the Commission respecting the production costs of American companies and to allow the relator to cross-examine the investigators, experts, agents, and witnesses who supplied the Commission with information, all with a view *as alleged*, to enable the relator to more properly present its case to the Commission. To issue the writ at this stage would be unavailing. The inquiry has been completed, the hearings closed, the Commission's report has been transmitted to the President, and the President has reached a judgment and issued a proclamation fixing the tariff. It would avail the relator nothing to issue the writ. The President's proclamation is not invalid because of any irregularities in the proceedings of the Commission leading up to the report furnished him for his assistance.

Section 315(e) of the Tariff Act of 1922 provides that investigations shall be made to assist the President, and that no proclamation shall issue until such investigation shall have been made, and subdivision (e) of the same section gives the President authority to make needful rules and regulations for carrying out the provisions of the section. It is evident that the President has a right to require an investigation by the Commission for his assistance, and that it is the duty of the Commission to proceed with such an investigation when asked by the President. There is no other provision in the Tariff Act of 1922 making it the duty of the Com-

mission to make any such investigation. It is entirely discretionary with the Commission whether it will conduct any such inquiry if not requested by the President.

Section 703 of the Revenue Act of September 8, 1916, under which the Commission was created, provides that it must make investigations at the request of the President, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, or of either House, but investigations which it may be required to make under Section 703 are not investigations which involve the necessity of giving anybody a hearing. The provision for hearings is contained only in that provision of the Tariff Act of 1922 which provides for investigations by the Commission to assist the President to adjust the tariff to equalize production costs.

For all that appears in the record, the President is satisfied with the report as made and has apparently been given all the assistance he requires. He has reached and announced his decision, and does not ask for a reconsideration by the Tariff Commission. The Commission is therefore under no duty to reopen the hearings or to file any additional report, and may not be required to do so by mandamus, and there is no reason to believe that where the costs of production of American companies have been ascertained by minute ex-

amination of their books and records by experts of the Commission, a disclosure of that information to a foreign competitor would result in discrediting the information and change the conclusions of the Commission. The fact that sometime the Commission may be asked by Congress, under Section 703 of the Revenue Act of 1916, to furnish to Congress the information it has in its possession is no basis for requiring the hearings under the flexible tariff provision to be reopened. In short, the Commission is under no duty to conduct a new investigation or reopen the old one. It is under no duty to make any further report to the President. If it did so, the President would not be obliged to give the report any attention. The relief sought would be no more availing to the relator, if granted, than would it avail a litigant to compel a court after judgment to hear some additional evidence where the judgment is not to be vacated or affected.

## II

### IT WOULD BE INEQUITABLE TO GRANT THE RELATOR THE RELIEF SOUGHT

In *United States ex rel. Turner v. Fisher*, 222 U. S. 204, 209, it was said:

Mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

In *People ex rel. The Durant Land Improvement Company v. Jeroloman*, 139 N. Y. 14, 17, it was said:

A mandamus is only granted in the sound discretion of the court. This discretion is not, of course, a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus, the court may, in the exercise of its discretion, refuse the writ.

See also *Duncan Townsite Company v. Lane*, 245 U. S. 308, 311; *Ex parte Skinner & Eddy Corporation*, 265 U. S. 86.

The relator, both in this suit and in the hearings before the Commission, acts in a representative capacity for the Norwegian manufacturer. That company declined to give the Commission's experts, sent to Europe for the information, any data or information respecting costs of production. It reiterated that refusal in a telegram during the hearing before the Commission, and its evident ground for the refusal was that the information is of a confidential nature which could not be disclosed without advantage to its competitors and injury to its business. It was apparently unwilling to disclose the information or assist the Commission even under the rule of the Commission to treat the information as confidential. In the face of this refusal to aid the Commission in its work on one branch of the inquiry, it is not in position to demand

that like confidential information obtained from its American competitors under a promise of secrecy be disclosed to it. The relator claims that it has all the rights of an ordinary litigant in a judicial proceeding in hearings before the Commission. A litigant in a judicial inquiry who refuses to produce information needed to aid the tribunal in reaching a just conclusion is not in good standing. That the real purpose of the relator in seeking the information respecting American costs of production was not to influence the judgment of the Commission, but to acquire competitive information of value in its business is fairly to be inferred from its conduct at the hearing and the circumstances of the case. The American cost of production had been arrived at by direct examination by the Commission's field experts of the books and records of the American companies. Barring fraud or dishonesty somewhere, it is obvious that the information available to the Commission would not have been improved by disclosing these figures to the foreign competitor for the alleged purpose of cross-examination. In addition to these considerations, although the Commission is given by statute power to issue subpoenas and compel the production of evidence, the data from American companies was voluntarily furnished under promise that it would be treated as confidential. To grant the relief sought would be to compel the Commission to violate this promise.

## III

**THE STATUTORY PROVISION THAT THOSE INTERESTED  
ARE ENTITLED TO BE HEARD WILL NOT BEAR THE  
CONSTRUCTION PLACED ON IT BY THE RELATOR**

The misconception underlying the relator's entire argument is that it has some property right which entitles it to a hearing and the deprivation of which would deny it due process of law. No importer and no American manufacturer has any right of property affected by a change in tariff. Such changes may destroy a business without infringing any right. The hearings before the Tariff Commission are not judicial inquiries. (*Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226.) They are not quasi judicial in the sense of applying any existing law to determine rights. They are aimed only at acquiring information to guide what is, in substance, legislative action, making changes in the tariffs on imports. Tariff changes do not, as may legislative rate-making, impair rights of property. An investigation by the Tariff Commission under the provisions of this statute is not a contest between an individual American producer and an individual foreign importer in which each contender is entitled to see the evidence his opponent relies on to make out his case. It is merely a statistical inquiry in the general public interest. Such right to a hearing as exists is conferred by statute and the question is merely one of statutory construction. The word "hearing" has no hard and

fast legal significance. The hearings before the Tariff Commission have been provided for as a partial substitute for hearings before legislative committees, and the provision in the statute for hearings before the Commission should be construed and applied as directing procedure similar to hearings before legislative committees. The provision in the statute is that:

The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

If the words "to be heard" give to an interested party a right to a hearing in the sense of a judicial hearing, it would include the right to be present, the right to produce evidence, the right to cross-examine witnesses and have all of the evidence produced at the hearing, and the right to compulsory process to require the attendance of witnesses. It is plain that Congress never intended any such procedure. If the words "to be heard" were so intended, then the provision giving an interested party the right to be present and to produce evidence was surplusage, because those rights would be included in such a hearing. Congress has named three rights: One is to be present, another is to produce evidence, and the third is to be allowed to make arguments.

Even in the case of hearings on unfair practices in import trade covered by Section 316 which may be undertaken on complaint, under oath, of persons injuriously affected and which do directly affect individual rights, it is provided in subdivision (e) that the Commission shall only be required to give such notice and afford such hearing or rehearing, and with such opportunity to offer evidence as the Commission may deem sufficient for a full presentation of the facts. It is quite clear under Section 316 that a controversy over unfair practices is largely within the control of the Commission as to the nature of the hearings, and the provision under Section 315 relating to an investigation leading up merely to a report on proposed tariff changes should not be construed to give greater rights than Section 316.

The provision in Section 315 requires the Commission only to give interested parties a *reasonable* opportunity to be present and to be heard, and the Commission is authorized to adopt such reasonable procedure and rules as it may deem necessary.

Surely the Commission is not acting in an unreasonable way within the meaning of this statute when it denies to a foreign competitor the right to examine confidential data obtained from American manufacturers and verified by the Commission itself through an examination of the original books of account, and a regulation or rule of procedure is reasonable, within the meaning of this statute,

which prohibits the disclosure of such confidential information.

It is not necessary to inquire or determine whether production costs are trade secrets within the meaning of that provision of the statute which makes it a criminal offense for the Commission to disclose trade secrets. The Commission's rules prohibited the disclosure of trade secrets, and it used that term in its rules with the understanding that it applied to confidential information respecting costs of production; and that construction of its own rule was stated in the printed forms presented to American manufacturers. The Commission makes its own rules and is the judge of their meaning, and information as to costs of production is a trade secret within the meaning of that term as used by the Commission. Treating as confidential, information respecting costs of production, which is considered by business men as a business secret, is reasonable and even necessary to enable the Commission to readily obtain complete information. The Commission would meet with resistance and obstruction if it were not able to obtain such data upon assurances to business men which will be protected and upheld by the courts.

The relator's contentions lead to the conclusion that the institution of an inquiry by the Tariff Commission, with a view to aiding the President in equalizing the costs of production at home and abroad, opens the doors wide to the foreign manufacturers and competitors of American industry to

obtain exact information respecting the costs of production and business secrets of American concerns, without, at the same time, disclosing any like information respecting their own operations, because the Americans are accessible to writs of subpoena and the foreigners are not.

Carried to its logical conclusion, the relator's position also must be that all of the evidence on which the Commission acts must be introduced at the hearing and not acquired in other ways. This was the position of the relator originally, as it said (R. 27) :

This paragraph, as it integrally shows, was calculated to require that the evidence upon which the Tariff Commission acted should be verified and taken after due notice to all interested parties who were entitled to be present, to produce evidence, and to be heard upon all the evidence produced and not upon a part of such evidence.

Realizing that the statute makes it plain that the Commission may act on information and evidence acquired otherwise than at the hearings, the relator has shifted its position and invented the theory that "whenever, by public or private proceedings the Commission after listening to its agents and after going over what they have collected accepts it as part of the data for the purpose of proceeding to a conclusion in a particular case, that action of accepting the selected parts constitutes a 'hearing' and that data so selected to be acted upon is the subject of the right given by Section 315(c) to

interested parties 'to be present, to produce evidence and to be heard thereupon.' " (Relator's brief, p. 95.)

The sections of the Interstate Commerce Act and the decisions thereunder relied upon by the relator to define what is meant by a hearing, have no application here. The section of the Interstate Commerce Act directing the manner of conducting hearings before the Commission is differently worded and has an entirely different background. While the fixing of rates for service by carriers is legislative, nevertheless the fixing of rates affects property rights and a rate so fixed may operate to confiscate property. At some stage, the question becomes a judicial one, and the sections of the Interstate Commerce Act providing for hearings are framed on the theory that the Commission should act judicially and conduct its hearings accordingly.

The decision in *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, and other cases cited by the relator, dealt with hearings that were judicial or quasi-judicial, construed statutes differently phrased and relating to different subjects, and dealt with cases where the action resulting from the hearing did affect rights of property which were entitled to judicial protection. Such authorities have no application to the case of changes in tariffs on imports, which affect no property rights in any legal sense, and with respect to the amount of which, at no stage, has an importer or manufacturer a right to a judicial hearing.

The same distinction is to be made between the present case and those relating to administrative hearings on exclusion and deportation of aliens, where rights of personal liberty, protected by the Fifth Amendment, are affected.

A similar contrast is afforded in the Tariff Act itself. In Section 501, which deals with appeals by importers from the decision of the appraiser to the Board of General Appraisers, it is provided that the General Appraiser who considers the appeal—

shall give reasonable notice to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence.

That section deals with a proceeding, judicial in its nature, which involves the application of an existing statute to determine the amount of duty, and in that section is expressly given the very rights which the relator claims with respect to inquiries before the Tariff Commission. The absence from Section 315, relating to hearings before the Tariff Commission, of any such provision allowing cross-examination of witnesses and inspection of all evidence produced, is enough in itself, the two sections being found in the same statute, to refute the relator's contention.

The question being one of statutory construction and of the intent of Congress in the use of the words "to be heard," the considerations above mentioned lead to the conclusion that in the Tariff Act Congress did not use those words in the same sense that the word "hearing" is used in the Interstate Commerce Act and decisions thereon, or as the word "hearing" is used in immigration cases, and did not intend that the hearings before the Tariff Commission should have all the features of judicial or quasi-judicial proceedings, but, on the contrary, should be similar to the customary hearings before legislative committees.

The legislative history of the provision relating to hearings is set forth in the Appendix hereto, page 49. It shows that the conference committee struck out a Senate amendment requiring that *all* the hearings of the Commission should be public and that all testimony should be made public, and struck out other provisions which would have required hearings judicial in character.

If the construction of the statute urged by the relator is sustained and the unlimited numbers of interested persons who may appear at such hearings are given the rights asserted, the statute would be found unworkable, the control of the proceedings impossible, and American business concerns exposed to minute inquisition by foreign competitors without any real gain in the information available to the President in applying the statute.

The case should be treated as moot and dealt with accordingly, or the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,  
*Solicitor General.*

ROBERT P. REEDER,  
*Attorney.*

DECEMBER, 1926.



## APPENDIX

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REVENUE ACT OF SEPTEMBER 8, 1916, c. 463, 39 STAT.  
756, 795 ET SEQ.

SEC. 700. That a commission is hereby created and established, to be known as the United States Tariff Commission (hereinafter in this title referred to as the commission), which shall be composed of six members, who shall be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of the same political party. In making said appointments members of different political parties shall alternate as nearly as may be practicable. The first members appointed shall continue in office for terms of two, four, six, eight, ten, and twelve years, respectively, from the date of the passage of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of twelve years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate annually the chairman and vice chairman of the commission. No member shall engage actively in any other business, function, or employment. Any member may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy shall not impair the

right of the remaining members to exercise all the powers of the commission, but no vacancy shall extend beyond any session of Congress.

SEC. 701. That each commissioner shall receive a salary of \$7,500 per year, payable monthly. The commission shall appoint a secretary, who shall receive a salary of \$5,000 per year, payable in like manner, and it shall have authority to employ and fix the compensations of such special experts, examiners, clerks, and other employees as the commission may from time to time find necessary for the proper performance of its duties.

With the exception of the secretary, a clerk to each commissioner, and such special experts as the commission may from time to time find necessary for the conduct of its work, all employees of the Commission shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation or upon official business in any other places than at their respective headquarters, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Unless otherwise provided by law, the commission may rent suitable offices for its use, and purchase such furniture, equipment, and supplies as may be necessary.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such

agents as it may designate, prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country.

SEC. 702. That it shall be the duty of said commission to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs laws, and, in general, to investigate the operation of customs laws, including their relation to the Federal revenues, their effect upon the industries and labor of the country, and to submit reports of its investigations as hereafter provided.

SEC. 703. That the commission shall put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress, and shall report to Congress on the first Monday of December of each year hereafter a statement of the methods adopted and all expenses incurred, and a summary of all reports made during the year.

SEC. 704. That the commission shall have power to investigate the tariff relations between the United States and foreign countries, commercial

treaties, preferential provisions, economic alliances, the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption, and conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production.

SEC. 705. That upon the organization of the commission, the Cost of Production Division in the Bureau of Foreign and Domestic Commerce in the Department of Commerce shall be transferred to said commission, and the clerks and employees of said division shall be transferred to and become clerks and employees of the commission, and all records, papers, and property of the said division and of the former tariff board shall be transferred to and become the records, papers, and property of the commission.

SEC. 706. That for the purposes of carrying this title into effect the commission or its duly authorized agent or agents shall have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation. Any member of the commission may sign subpoenas, and members and agents of the commission, when authorized by the commission,

may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. (See amendment to this paragraph on page 46, *infra*.)

Upon the application of the Attorney General of the United States, at the request of the commission, any such court shall have jurisdiction to issue writs of mandamus commanding compliance with the provisions of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and

shall then be subscribed by the deponent. Any person, firm, copartnership, corporation, or association, may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission, as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the commission, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States: *Provided*, That no person shall be excused, on the ground that it may tend to inerminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpœna of the commission; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 707. That the said commission shall in appropriate matters act in conjunction and cooperation with the Treasury Department, the Department of Commerce, the Federal Trade Commission, or any other departments, or independent establishments of the Government, and such departments and independent establishments of the Government shall cooperate fully with the commission for

the purposes of aiding and assisting in its work, and, when directed by the President, shall furnish to the commission, on its request, all records, papers, and information in their possession relating to any of the subjects of investigation by said commission and shall detail, from time to time, such officials and employees to said commission as he may direct.

SEC. 708. It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. The commission shall have power to investigate the Paris Economy Pact and similar organizations and arrangements in Europe.

SEC. 709. That there is hereby appropriated, for the purpose of defraying the expense of the establishment and maintenance of the commission, including the payment of salaries herein authorized, out of any money in the Treasury of the United States not otherwise appropriated, the sum of \$300,000 for the fiscal year ending June thirtieth, nine-

teen hundred and seventeen, and for each fiscal year thereafter a like sum is authorized to be appropriated.

**TARIFF ACT OF SEPTEMBER 21, 1922, c. 356, 42 STAT. 858, 941 ET SEQ.**

SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in cost of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said difference in cost of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production

necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(e) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) for the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such

investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon

certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Pro-*

*vized, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.*

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

SEC. 317. (a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition in or transportation in transit through or re-exportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;

Discriminates, in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United

States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such articles of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

(e) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Whenever the President shall find as a fact that any foreign country places any burdens upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burdens, not to exceed 50 per centum ad valorem or its equivalent, and on and after thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United

States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the

same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this Act shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.

(g) It shall be the duty of the United States Tariff Commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(h) The Secretary of the Treasury with the approval of the President shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this section.

(i) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

SEC. 318. (a) That in order that the President and the Congress may secure information and assistance, it shall be the duty of the United States

Tariff Commission, in addition to the duties now imposed upon it by law, to—

(1) Ascertain conversion costs and costs of production in the principal growing, producing, or manufacturing centers of the United States of articles of the United States, whenever in the opinion of the commission it is practicable;

(2) Ascertain conversion costs and costs of production in the principal growing, producing, or manufacturing centers of foreign countries of articles imported into the United States, whenever in the opinion of the commission such conversion costs or costs of production are necessary for comparison with conversion costs or costs of production in the United States and can be reasonably ascertained;

(3) Select and describe articles which are representative of the classes or kinds of articles imported into the United States and which are similar to or comparable with articles of the United States; select and describe articles of the United States similar to or comparable with such imported articles; and obtain and file samples of articles so selected, whenever the commission deems it advisable;

(4) Ascertain import costs of such representative articles so selected;

(5) Ascertain the grower's, producer's, or manufacturer's selling prices in the principal growing, producing, or manufacturing centers of the United States of the articles of the United States so selected; and

(6) Ascertain all other facts which will show the differences in or which affect competition between articles of the United States and imported articles in the principal markets of the United States.

(b) When used in this section—

The term "article" includes any commodity, whether grown, produced, fabricated, manipulated, or manufactured;

The term "import cost" means the price at which an article is freely offered for sale in the ordinary course of trade in the usual wholesale quantities for exportation to the United States plus, when not included in such price, all necessary expenses, exclusive of customs duties, of bringing such imported article to the United States.

(c) In carrying out the provisions of this section the commission shall possess all the powers and privileges conferred upon it by the provisions of Title VII of the Revenue Act of 1916, and in addition it is authorized, in order to ascertain any facts required by this section, to require any importer and any American grower, producer, manufacturer, or seller to file with the commission a statement, under oath, giving his selling prices in the United States of any article imported, grown, produced, fabricated, manipulated, or manufactured by him.

(d) The commission is authorized to establish and maintain an office at the port of New York for the purpose of directing or carrying on any investigation, receiving and compiling statistics, selecting, describing, and filing samples of articles, and performing any of the duties or exercising any of the powers imposed upon it by law.

(e) The United States Tariff Commission is authorized to adopt an official seal, which shall be judicially noticed.

(f) The second paragraph of section 706 of the Revenue Act of 1916 is amended to read as follows:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

#### LEGISLATIVE HISTORY OF PROVISION AS TO HEARINGS

While several Senators had said that hearings would be necessary before new rates were established by the President (62 Cong. Rec. pt. 6, p. 5885; pt. 11, pp. 11155, 11156) the committee made no move toward placing such a provision in the bill until August 11, when it proposed (62 Cong. Rec., pt. 11, p. 11229) to insert in the Act the words:

The commission is authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under this section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon. The commission shall prepare its

findings in the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

In the Senate this provision was amended (62 Cong. Rec., pt. 11, pp. 11231, 11232) to read:

The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Such hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings, hearings, and testimony public as soon as practicable after the issuance of a proclamation under the provisions of this section.

This provision was changed in conference (62 Cong. Rec., pt. 12, p. 12627) to read as it stands in the present law. The entire paragraph in Section 315 (e) of the law as enacted is as follows:

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reason-

able public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The managers on the part of the House reported  
(62 Cong. Rec., pt. 12, p. 12660) :

The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.



# SUPREME COURT OF THE UNITED STATES.

No. 91.—OCTOBER TERM, 1926.

United States of America *ex rel.* Norwegian Nitrogen Products Co., Inc., Plaintiff in Error,  
vs.  
United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al. } In Error to the Court of Appeals of the District of Columbia.

[April 11, 1927.]

Mr. Justice STONE delivered the opinion of the Court.

The Tariff Act of September 21, 1922, c. 356, § 315, 42 Stat. 858, 941, vested in the President the power to adjust tariff duties so as to equalize differences in costs of production here and abroad of articles wholly or in part the growth or product of this country, whenever an investigation by the Tariff Commission should reveal disparate costs. Such investigation is made a prerequisite to action by the President in proclaiming changes of rates. By Executive Order of October 7, 1922, it was provided that all petitions or applications for action or relief under the so-called flexible sections of the Tariff Act of 1922 should be filed with the Tariff Commission.

In October, 1922, the American Nitrogen Products Company, a corporation of the State of Washington, filed with the United States Tariff Commission a petition praying for a fifty per cent. increase in the duty imposed by the Tariff Act of 1922 upon imported sodium nitrite. The following March, the Tariff Commission, for the purpose of assisting the President in the exercise of the powers delegated to him by the Act of 1922, ordered an investigation of the differences in cost of production of sodium nitrite at home and abroad, and of other pertinent facts and conditions. It was further ordered that all parties interested should be given an opportunity to be present and produce evidence at a public hearing to be held at a date to be fixed later.

Plaintiff in error is engaged in the importation of nitrogen products into the United States which it sells on commission. It rep-

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resents in the United States as exclusive agent the Norwegian Hydro-Electric Nitrogen Corporation, the only manufacturer of sodium nitrite in Norway. Representatives of the Commission in the course of its investigation proceeded to Norway and Germany and sought from the Norwegian company and from German manufacturers data showing the cost of production of sodium nitrite in those countries. This was refused. The Commission's experts were permitted to examine the books and records of American manufacturers, obtaining information of the domestic cost of production and other relevant data. This information was given under promise that it should be treated as confidential and upon the assurance that the rules of the Commission and § 708 of the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 798, so required. Section 708 prohibits the Commission from revealing "the trade secrets or processes" of which it might learn in the course of its investigations.

After making its investigation, the Commission ordered a public hearing to be held on September 10, 1926. Its rules provided that: "Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes."

At the hearing, plaintiff appeared by counsel and demanded a complete copy of the application of the American Nitrogen Products Company and attempted to cross examine its president as to its cost of production. In making these and other similar demands in the course of the hearings, plaintiff relied on the provisions of § 315(e) of the Act of 1922, reading in part: "The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." The Commission, holding that its action was controlled by § 708 of the Revenue Act of 1916, prohibiting it from divulging trade secrets or processes of which it acquired information in the course of investigation, excluded the questions asked and disclosed only a copy of the application of the American company, from which a statement of its costs of production had been deleted. On September 15, 1923, the Commission made a preliminary re-

port stating the results of its inquiry. The report contained a review of the data in the possession of the Commission, including an estimate of the cost of production in Norway, based upon such public sources in Norway as were available to it, both the Norwegian company and the plaintiff having refused to give any information on the subject. But following its settled policy, it withheld all material which would reveal the individual production costs of American manufacturers. Its practice is to publish the average domestic cost, but this was withheld here because the average cost was deemed informative of individual costs in view of the small number of American manufacturers. Hearings were resumed on September 26, at which plaintiff was given an opportunity to offer evidence, to make oral argument and to file briefs. Requests by plaintiff to cross examine the Commission's field examiners and experts and to inspect data gathered by them were refused.

Plaintiff then filed with the Supreme Court of the District of Columbia a petition for mandamus, directing the Tariff Commission to disclose the information which it had obtained concerning the cost of production of sodium nitrite by American and foreign manufacturers, and directing the commissioners to hold a public hearing at which plaintiff should be given an opportunity to cross examine the investigators and experts of the Commission, and witnesses with respect to such data, to offer evidence in opposition, and to present arguments against the American company's petition. The Commission interposed an answer setting up that § 708 of the Revenue Act forbade the Tariff Commission from disclosing the information sought. To this answer the plaintiff demurred. The demurrer was overruled and final judgment was entered dismissing the petition.

Pending review by the Court of Appeals of the District of Columbia, the Commission completed and submitted its report to the President. On May 6, 1924, the President made proclamation reiterating the investigation of the Committee and fixing the duty at a rate found necessary to equalize the cost of production of sodium nitrite at home and abroad. The Court of Appeals affirmed the judgment, holding that the case had become moot by the action of the President in fixing the new rate of duty. Notwithstanding

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this determination, it reviewed the case at length and announced its conclusion on the merits. 6 Fed. (2d) 491.

The case is properly here on writ of error under § 250 of the Judicial Code before the amendment of February 13, 1925, defendant in error having by its answer drawn in question the construction of § 708 of the Revenue Act. *Santa Fe Pac. R. R. v. Work*, 267 U. S. 511; *Brady v. Work*, 263 U. S. 435; *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117.

We conclude that the case had become moot before the review below and that it is unnecessary for us to indulge in a discussion of the merits. Under § 315 (e) and (e) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required. There is no other provision of the Act placing any duty on the Commission to make such an investigation. When not so requested by the President, action by the Commission is discretionary. Under its rules, it is optional with it whether it will employ its resources for investigations sought by an interested party. Section 703 of the Revenue Act of September 8, 1916, under which the Commission was created, requires it to make certain specified studies of the administration and operation of the tariff laws of the United States and tariff relations of the United States with foreign countries, on request of the President and certain Committees of the two houses of Congress. That Act has no relevancy here since, unlike the Act of 1922, it contains no provisions for hearings in conjunction with the investigations there authorized.

All relief sought here is incidental to the hearing before the Commission on the cost of production of sodium nitrite. The Commission conducted its inquiry and held these hearings to aid the President in determining whether the difference in cost of that product in this and in foreign countries should be equalized by revising the tariff under § 315(a) of the Act of 1922. The hearing pending when the plaintiff's petition was filed has been concluded as it lawfully might, since there was no injunction or restraining order and the Commission's action was taken after the determination of the Supreme Court of the District in its favor. We need not consider here the effect upon judicial review of an

attempt to evade or forestall a decision adverse to the Commission. The Commission has filed its report with the President and the President has made his decision and proclamation fixing the revised tariff. Either may revive the investigation but neither is under a duty to do so. Assuming that the plaintiff is entitled to a hearing of the character demanded whenever an investigation is had, which we do not decide, it would be an idle ceremony to require such a hearing upon an investigation which we may not command and which may never be made. In such circumstances there can be no effectual relief by mandamus and the Court of Appeals should have remanded the cause with directions to dismiss the petition as moot. *Brownlow v. Schwartz*, 261 U. S. 216; *Mills v. Green*, 159 U. S. 651, 653.

The argument is made that the President was without jurisdiction to proclaim the new tariff rate because of alleged irregularities in the conduct of the hearing before the Commission which was a prerequisite to such action by the President. But petitioner does not attack the validity of the tariff proclaimed by the President; nor is this an appropriate proceeding in which to do so. Even if the change in tariff rates were deemed to be ineffectual, it would not follow that it is mandatory upon the President or the Commission to institute a new hearing.

The judgments of the Court of Appeals and the Supreme Court of the District of Columbia are vacated and the cause remanded with directions to dismiss the petition as moot.

*So ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*